REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2017/00400

In the matter between:

DANIEL SIBOLEKA MUSWEU	**APPLICANT**

and

THE CHAIRPERSON OF THE APPEAL TRIBUNAL	**FIRST RESPONDENT**
HENRY MUHONGO	**SECOND RESPONDENT**
ZAMBEZI COMMUNAL LAND BOARD	**THIRD RESPONDENT**
MASUBIA TRADITIONAL AUTHORITY	**FOURTH RESPONDENT**

Neutral citation: *Musweu v The Chairperson of the Appeal Tribunal* (HC-MD-CIV-MOT-REV-2017/00400) [2022] NAHCMD 169 (5 April 2022)

Coram: ANGULA DJP
Heard: **9 December 2021**
Delivered: **5 April 2022**

Flynote: Review application – Communal Land Reform Act, 5 of 2002 (the 'Act') – Doctrine of Ultra Vires – Sections 39(1), (3) and (6) and regulation 25 promulgated under the Act – *Functus Officio* – Right to be heard – Misdirection in the application of the law to the facts.

Summary: In this review application, the applicant sought an order reviewing and setting aside the decision taken by the first respondent on 3 June 2017 – In terms of the said decision, the applicant and his family were ordered to vacate a certain piece of customary land under dispute – The order further directed the second respondent to apply to the Zambezi Communal Land Board to ratify the decision taken by the Masubia Traditional Authority during 1996 – In terms of the 1996 traditional authority decision, the disputed piece of land was allocated to the second respondent – Disgruntled by that order of the first respondent, the applicant launched this application which was opposed by the respondents on multiple grounds.

Held; that the appeal tribunal only became *functus officio* after the decision of 16 August 2014;

Held; that the applicant did not challenge the constitutionality of regulation 25 and in the absence of such a challenge, the appeal tribunal acted within its statutory powers;

Held; that there was no merit in the applicant's point that the appeal tribunal placed over reliance on the evidence of Messrs Munyaza and Simasiku and that even if it did, they were independent witnesses who had no interest in the outcome of the matter; and

Accordingly, the application was dismissed with costs.

ORDER

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1. The application is dismissed with costs.

2. The matter is removed from roll and is finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] The applicant launched this review application whereby he seeks an order reviewing and setting aside the decision of the first respondent, the Chairperson of the Appeal Tribunal taken on 3 June 2017. The effect of that decision was that the applicant and his family members were ordered to vacate a disputed piece of communal of land situated under the jurisdiction of the fourth respondent, the Masubia Traditional Authority. The decision further directed the second respondent to submit an application to the third respondent, the Zambezi Communal Land Board to enable the latter to ratify the decision of Masubia Traditional Authority made during 1996 which allocated the said disputed piece of land to the second respondent, Mr Muhongo. The applicant is aggrieved by that decision of the Appeal Tribunal, which he claims rendered him landless and for that reason he challenges it on a number of grounds. The application is opposed by the respondents.

The parties

[2] The first respondent is the Chairperson of the Appeal Tribunal, appointed by the Minister of Land Reform in terms of s 39 of the Communal Land Reform Act[1] ('the Act') read with reg 25[2].

[3] The second respondent is Mr Henry Muhongo. He is the headman of the Muhongo Village, Nasefu Nsundwa area, Zambezi Region, and is residing at in, Suiderhof, Windhoek, Namibia.

[4] The third respondent is the Zambezi Communal Land Board, whose service address is Ministry of Land Reform, Katima Mulilo, Zambezi Region, Namibia. The third respondent is said to have been cited to the proceedings for any interest it might have in the outcome of this matter. No relief is sought against it.

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[1] Communal Land Reform Act 5 of 2000.
[2] Regulations in terms of the Communal Land Reform Act, 5 of 2000 (GN 100 in GG 5760 of 15 June 2015).

[5] The fourth respondent is the Masubia Traditional Authority, whose place of business is situated at, Bukalo Village, Katima Mulilo, Zambezi Region, Namibia. The fourth respondent has been equally cited to the proceedings for any interest it might have in the outcome of this matter. No relief is sought against it.

[6] The applicant was represented by Mr Muluti. The first, third and fourth respondents were represented by Mr Ncube from the Office of the Government Attorney. The second respondent was represented by Mr Sibeya. Counsel filed insightful heads of argument for which the court wishes to express its appreciation.

Background

[7] The background to this application goes back over forty years. From the parties' undisputed versions it would appear that on or about 1979, the applicant's family moved to live on the disputed land, called Nansefu, which was occupied by the second respondent's family. According to the second respondent, the applicant and his family were allocated land called Ngoma, situated some few kilometers from Nansefu for the purpose of establishing their homestead.

[8] During 1996, a dispute over Nansefu arose between the applicant's and the second respondent's families. The dispute was adjudicated upon by the fourth respondent, the Masubia Traditional Authority. After having heard the parties' evidence, it ruled in favour of the second respondent and ordered the applicant's family to vacate the Nansefu piece of land. I should mention that the applicant, in his replying affidavit, disputes the existence of the Masubia Traditional Authority during 1996. It must then be the predecessor to the current Traditional Authority.

[9] It would appear to be common cause that during 2011, the third respondent, the Zambezi Communal Land Board visited Nansefu in order to register the second respondent's residential land rights in terms of the Act. Once again a dispute erupted when it became apparent that the applicant too was desirous of having his residential land rights registered in respect of Nansefu. As a result of the conflicting claims to Nansefu, the Land Board and the Masubia Traditional Authority conducted an investigation and thereafter both ruled on 30 August 2013 that the land at

Nansefu should be registered in the names of the applicant and the second respondent's family jointly.

[10] Not satisfied with the decisions of the Land Board and the Masubia Traditional Authority, the second respondent filed an appeal in terms s 39 of the Act. Thereafter the minister established an Appeal Tribunal pursuant to the provisions of the Act.

[11] Having considered the appeal, the Appeal Tribunal delivered, what it termed, an interim judgment on 16 August 2014 setting aside the decisions of both the Land Board and the Masubia Traditional Authority. It ruled that the disputed land should be registered in the names of both the applicant and the second respondent. It further ordered the Land Board to consider the applications submitted by the applicant and the second respondent. In addition, it ordered the Land Board to 'carry out a comprehensive investigation and conduct a hearing in accordance with s 28(6) and (9) or s 37 of the Act'.

[12] Subsequent thereto the Land Board conducted hearings which were attended by both the applicant and members of his family as well as by the second respondent together with members of his family. Thereafter, on 31 March 2016 the Land Board made a ruling reiterating that the two families should stay together.

[13] The second respondent filed an appeal to the Appeal Tribunal against the decision of the Land Board. In the meantime, whilst awaiting the outcome of the Appeal Tribunal decision, the second respondent filed supplementary submissions to the Appeal Tribunal.

[14] The Appeal Tribunal delivered its 'final judgment' on 3 June 2017 holding that the land at Nansefu should be registered by way of customary land rights in the name of the second respondent. It further ordered the Masubia Traditional Authority to revert to its decision of 1996 by allocating the land at Nansefu to the second respondent and to provide the second respondent with the necessary documents so as to enable him to apply to the Land Board for the ratification of the traditional authority allocation. The Appeal Tribunal further ordered the Land Board to ratify the application from the Masubia Traditional Authority regarding the second

respondent's application for registration of customary land rights and to conclude the process on or before 1 September 2017.

[15] That concludes the factual background to the present application. I now turn to set out the applicant's grounds for review.

Grounds for review

[16] The applicant raises three grounds of review on which he seeks the decision of the Appeal Tribunal to be set aside. These are: (1) the decision *is ultra vires* the provisions of s 39(1), (3) and (6) of the Act; (2) failure by the Appeal Tribunal to accord the applicant a right to be heard before taking the impugned decision; and (3) that the Appeal Tribunal misapplied the law to the facts. I will consider the grounds in the sequence they have been set out in this paragraph.

Decision ultra vires the provisions of ss 39(1), (3) and (6) of the Act read with Reg 25

[17] The relevant subsection of s 39 reads as follows:

> '39. (1) Any person aggrieved by a decision of a Chief or a Traditional Authority or any board under this Act, may appeal in the prescribed manner against that decision to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned.
>
> (2) an appeal tribunal consists of such person or number of persons as the Minister may appoint, who must be a person or persons with adequate skills and expertise to determine the appeal concerned.
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> (3) If two or more persons are appointed under subsection (2) the Minister must designate one of them to act as chairperson of the appeal tribunal.
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> (4) All the members of an appeal tribunal constitute a quorum for a meeting of that tribunal.
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> (5) If the tribunal consists of more than one member -

(a) the decision of the majority of the members thereof shall be the decision of the appeal tribunal; and

(b) the chairperson of the appeal tribunal has a casting vote in addition to a deliberative vote in the case of an equality of votes.

(6) An appeal tribunal may -

(a) confirm, set aside or amend the decision which is the subject of the appeal;

(b) make any order in connection therewith as it may think fit.

(7) A member of the appeal tribunal who is not a staff member in the Public Service must be paid from money appropriated by Parliament for the purpose such remuneration and allowances as the Minister determines with the concurrence of the Minister of Finance.'

[18] Regulation 25 of the regulations promulgated under the Act reads:

'25. (1) Any person who wishes to appeal against a decision of a Chief, a Traditional Authority or a board, as the case may be, must lodge the appeal with the Permanent Secretary within 30 days after the decision has been made known or otherwise brought to his or her notice.

(2) The Permanent Secretary must as soon as is practicable -

(a) after he or she has received an appeal in terms of subregulation (1), notify the Minister thereof for the purposes of the appointment of an appeal tribunal by the Minister as contemplated in section 39(1) of the Act;

(b) after the Minister has appointed an appeal tribunal, submit the appeal to the appeal tribunal.

(3) An appeal referred to in subregulation (1) must be in writing and must set out -

(a) particulars of the decision appealed against;

(b) the grounds for the appeal; and

(c) any representations the appellant wishes to be taken into account in the hearing of the appeal.

(4) The fee set out in Annexure 2 in respect of an appeal must accompany the appeal.

(5) An appeal tribunal must hear an appeal within 30 days after the date from which it has received the appeal.

(6) Any decision of an appeal tribunal in terms of section 39(6) of the Act is conclusive and binding on the parties.'

[19] Mr Muluti for the applicant submits in his heads of argument that once the Appeal Tribunal had exercised its discretion by setting aside the decision which was the subject-matter of the appeal, it became *functus officio.* Counsel further argues that the Appeal Tribunal's decision of 16 August 2014 was not interim but was final. Accordingly, so the argument continues, when the Appeal Tribunal delivered what it termed a final judgment on 3 June 2017, they were not constituted and appointed as an appeal tribunal in terms of ss 39(2) and (3). Counsel therefore submits that the Appeal Tribunal acted outside the provisions of s 39 alternatively, they acted without statutory authority and as such their decision is a nullity and invalid in law.

[20] Mr Sibeya for the second respondent, for his part, submits in his heads of argument that the Appeal Tribunal order of 16 August 2014 was interim in nature while the final decision was delivered on 3rd June 2017. Counsel points out that s 39 empowers the Appeal Tribunal to make any order which it may think fit. Therefore, the interim order and the final order were within the power of the Appeal Tribunal as provided by s 39.

[21] Mr Ncube for the first, third and fourth respondents dealt with the broad nature of tribunals and their characteristics. He however joined forces with Mr Sibeya and

submitted that Tribunal's order of 16 August 2014 was interim as it did not dispose of the matter.

[22] In my considered view, the question whether the Appeal Tribunal's decision of 16 August 2014 was final or not is to be determined with reference to what the Appeal Tribunal termed an 'interim judgement'. In this regard it is to be noted that the Appeal Tribunal first identified what relief was sought by the second respondent, (then as an appellant). It stated: 'The applicant sought relief from this Tribunal that- "(i) the second respondent (the applicant) be evicted from the land in question for lack of right" '. It concluded that: 'However, the relief sought in this regard cannot be granted due to incomplete compliance with the provisions of s 28 or 37 of the Act by the first respondent.' As regards the second relief sought by the appellant (second respondent), the Appeal Tribunal stated as follows: '(ii) that the appellant's customary land right be permitted and accepted for registration'. The appellant did not submit to this Tribunal relevant copies of the application made to the first respondent (the 'Land Board'). Therefore, in the absence of knowledge of the type or kind of application made by the appellant the Tribunal cannot grant the relief sought.

[23] In my considered view, it is clear from the above statements by the Appeal Tribunal that it did not grant any of the relief sought by the second respondent. In my view, the fact that the Appeal Tribunal labelled its ruling and accompanying orders' as 'interim judgement' does not make its decision a judgment in the sense understood in judicial language. Furthermore the ruling did not resolve the dispute between the parties. The order made by the Tribunal was not directed to the parties before the Tribunal but was directed to the Land Board, namely to carry out a statutory investigation which ought to have been carried out before the matter served before the Tribunal.

[24] In my opinion, what the Appeal Tribunal delivered was an interim ruling on the question arising from the relief sought by the appellant namely, whether there was evidence on record which justifies the Tribunal granting the orders sought. It ruled that there was no evidence on record. The Tribunal found that there was no evidence mainly due to the Land Board's non-compliance with statutory provisions such as ss 28(6) and (9) and s 37. In other, words it was a ruling regulating the further conduct of the appeal before it. It accordingly ordered the Land Board to carry

out a comprehensive investigation and to conduct hearing in accordance with the mentioned statutory provisions.

[25] The ruling did not dispose any of the substantive relief sought. In this connection, I agree with Mr Sibeya's submission that s 39 vests wider powers on the Tribunal to make 'any order which it may think fit'. And therefore the interim order issued by the Tribunal was within its power and was thus not *ultra vires* as contended by Mr Muluti.

[26] It is necessary to briefly set out what these sections which the Tribunal in its interim order found were not complied with, stipulate. Section 28(6) obliges the Land Board when considering an application for the recognition and registration of customary land rights to conduct investigation and to consult persons in order to establish facts relevant to the applicant's claim. Section 28(9) deals with a situation where there are conflicting claims in relation to land – like in the present matter. Section 37 empowers the minister, in consultation with the Land Board, to establish an investigating committee to conduct a preliminary investigation and report it's finding to the Land Board. The Tribunal found that the provisions of those mentioned statutory provisions had not been complied with by the Land Board before it could make a decision which was the subject-matter of the appeal.

[27] As regards the pertinent question whether the Tribunal's order which set aside the decision of the board which allocated the disputed land to the applicant was final or interim, I am of the view that it was interim. I say this for the reason that it simply set it aside without making a determination as to whom the disputed land should be allocated. It would appear to me that the reason for not doing so was because it had to wait for the report from the board after the board had carried out the investigation which the Tribunal ordered to be carried out in compliance with ss 28 and 37 of the Act. I am fortified in this view by the fact that after the report from the board had been received, the Tribunal then made a final determination as to whom the disputed land should be allocated.

[28] If Mr Muluti's argument that Tribunal ceased to exist after it made its interim ruling, were to be taken to its logical conclusion, such reasoning would lead to an absurd situation. It would mean that after the Land Board had carried out its

investigation as ordered by the 'defunct' Tribunal, there would be no Tribunal to whom the Land Board could hand its report on the investigation. It would further mean that the minister would not be in position to appoint a new Tribunal because there would be no appeal that would have been submitted to the Permanent Secretary by any of the parties. It is clear that such reasoning would lead to 'manifest absurdity, inconsistency or hardship or would be contrary to the intention of the Legislature'.[3]

[29] For all those reasons, it follows thus that the ground for review that the Tribunal became *functus officio* after it had issued its order on 16 August 2014 must fail. I now turn to consider the applicant's second ground of review.

Failure by the Appeal Tribunal to accord to the applicant a right to be heard before taking its decision on 3 June 2017

[30] This ground is mainly premised on the supplementary submissions made by the second respondent to the Tribunal subsequent to which the Tribunal delivered its judgment on 3 June 2017. The applicant's gripe in this regard is that he was not invited by the Tribunal to file submissions. As a result, the applicant contends that his constitutional right to be heard before a decision adverse to him was taken by the Tribunal had been violated and for that reason the Tribunal's decision is liable to be reviewed and set aside.

[31] The applicant however acknowledges in his founding affidavit that regulation 25(3)*(c)* allows an appellant before the Tribunal, (in this matter the second respondent) to make representations in bolstering his or her appeal. The applicant went on to say that he is perturbed that the said regulation does not make provision for a respondent (such as him) to make representations to the Tribunal in order to counter the appellant's submissions. According to the applicant, he considers the omission to be a violation of his constitutional right to be heard before a decision adverse to him is taken by the Tribunal. The applicant therefore submits that the hearing by the Tribunal in the present matter was not fair and reasonable and was unconstitutional.

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[3] *Minister of Justice v Magistrate Commission* 2012 (2) NR 743 SC para [27].

[32] The applicant argues that the mere fact that regulation 25 omitted to include a respondent from making representations does not relieve the Tribunal, as an administrative body, from the obligation imposed upon it by Article 18 of the Constitution to act fairly and reasonably, by inviting a party, such as the applicant, to appear before it to make representations before making its decision. In the present matter, the failure by the Tribunal to invite the applicant to make representation renders the Tribunal's decision liable to be set aside, argues the applicant.

[33] The second respondent, in his supplementary answering affidavit, denies the applicant's claim that regulation 25(3)*(c)* violates his constitutional right by only affording the second respondent an opportunity (then as appellant) to make representations before the Appeal Tribunal and not also affording him an opportunity to make representations. The second respondent points out that the Appeal Tribunal during the hearing heard testimonies and submissions from both parties and therefore both parties were afforded a hearing.

[34] Mr Muluti referred the court to case law[4] which deal with well-established principles of natural justice as well as the persons' rights entrenched in Article 18 of the Constitution. Counsel then submitted that the Appeal Tribunal exercises the right of a judicial tribunal and therefore the parties appearing before it are entitled to expect that the right to fair trial under article 12 would be observed.

[35] Mr Sibeya points out that despite the applicant alleging that regulation 25(3) *(c)* violates his constitutional right to be heard, he has not challenged the constitutionality of regulation 25(3)*(c)*. Counsel therefore submits that until and unless the said regulation is challenged and declared unconstitutional, it remains on the statute books. I agree with counsel's submission in this regard.

[36] I should point out that the applicant is rather inconsistent about this ground. The applicant's stance in his founding affidavit is that the omission in regulation 25 to give right to a respondent to make representation does not relieve the chairperson of the Appeal Tribunal from the obligation to invite the respondent to make representations before the Appeal Tribunal makes its decision; and that failure to do

[4] *Kapika v Minister of Urban and Rural Development and 3 Others* (HC-MD-CIV-MOT-REV 2016/00331) NAHCMD 51 (9 March 2018) and *Disciplinary Committee for Legal Practitioners v Makando* Case No. A 370/2008 delivered on 18 October 2011.

so, renders the decision liable to be set aside for failure to comply with article 18 of the Constitution. However, in reply to the second respondent's denial that regulation 25(3)*(c)* is not unconstitutional, the applicant states that: 'I never said that regulation 25 is unconstitutional, my contention is that failure to serve the notice of appeal on me and afford me the right to be heard by the first respondent before taking the decision of 17 June 2017 violated my common law and constitutional right to (Article 18 of the Namibian Constitution) before a decision adverse to me is taken.'

[37] Quite apart from the inconsistency, nowhere in the applicant's founding affidavit does he state that the failure to serve the notice of appeal on him violated his right to be heard. This only complaint was raised for the first time in the replying affidavit. It trite that an applicant is require to make out his case in the founding affidavit. See: *Stipp & Another v Shade Centre & Others* 2007 (2) NR 627 (SC).

[38] In my considered view, if the applicant's stance is that he does not challenge the constitutionality of regulation 25, then logic dictates then that there was no obligation of the Appeal Tribunal to invite him to make representations. Article 18 obligates administrative bodies such as the Appeal Tribunal to 'comply with the requirements imposed upon such bodies and officials by the common law and <u>any relevant legislation</u>'. The relevant legislation in the present matter is regulation 25.

[39] In my opinion, the fact that regulation 25 failed to impose an obligation on the Appeal Tribunal to invite the applicant to make representations would not stand an unconstitutional challenge. In my judgment, the applicant's gripe, as an 'aggrieved person' in terms of Article 18, ought to have been directed his rage at regulation 25 and not at the Appeal Tribunal? The Tribunal simply complied with the provisions of regulation 25.

[40] Whatever the applicant's view might be towards regulation 25(3)*(c)*, it remains on the statute book and has to be complied with. If that sub-regulation is unconstitutional, it must be challenged by whoever is aggrieved by its provisions. Further, the regulation does not stipulate that the appellant must serve the notice of appeal on the respondent. Accordingly, the applicant's complaint in this regard has no basis in law and is rejected.

[41] In any event, the applicant's allegation that he was not afforded an opportunity to be heard is contradicted by the second respondent. According to the second respondent, the Appeal Tribunal heard arguments from both parties. The Chairperson of the Appeal Tribunal filed an affidavit. Therein he states that: 'the tribunal relied on *viva voce* evidence of various witnesses'. He went on to say that: 'Having had regard to the evidence led, on a balance of probabilities, the tribunal was satisfied with the evidence of the applicant.' From what has been averred by the Chairperson of the Appeal Tribunal, it would thus appear that the Tribunal had two versions before it – that of the applicant and as well as the second respondent. In view of the deposition by the chairperson, a doubt is cast on the veracity of the applicant's denial making it liable to be rejected on the papers.

[42] My conclusion in the immediate preceding paragraph is fortified by what appears in the body of the final judgment of the Appeal Tribunal. For instance, at para 17 of the final judgment of the Appeal Tribunal it is stated that:

> 'The respondent in their testimony continue to state as they did in the other hearings or investigations that they got they *(sic)* land from Munyaza.'

The Appeal Tribunal judgment thus confirms that the applicant's version was placed before the Appeal Tribunal and was considered but was, according to the Chairperson, rejected on a balance of probabilities.

[43] It follows thus from all those reasons and considerations that the applicant's ground for review that the Appeal Tribunal failed, (on his version), to afford him an opportunity to be heard before making its decision on 3 June 2017, must fail. I now turn to consider the third ground for review.

That the Appeal Tribunal misapplied the law to the facts

[44] As regards this ground, the applicant alleges that the findings made by the Appeal Tribunal were incorrect in that: the Tribunal 'overestimated' the testimonies of witnesses Munyaza and Benson Sai Sai Simasiku. Further, that the power to allocate rights to occupy and use land in terms of s 20 of the Act vests in the chief of that traditional community or the Traditional Authority of that community – in the

present case the Chief of the Masubia Traditional Authority. According to the applicant, the customary land rights in respect of the land he and his family are occupying at Nansefu and Nsundwa, where his village and crop farm are situated, were allocated to him by the Masubia Traditional Authority and not by Munyaza or Nankazana or Muhongo. This contradicts the content of the Appeal Tribunal judgment quoted in para 42 above.

[45] Mr Muluti submits in his heads of argument that s 28 of the Act protects the applicant's rights at Nansefu. According to counsel, the applicant and his family were in occupation of that land before the Act came into operation and thus could only lose that right if he had applied in terms of s 28(2) and that application was rejected in terms of s 28(1)*(a).* Section 28(1)(*a*) provides that a person who immediately before the commencement of the Act held a right in respect of occupation or use of communal land which was granted to or acquired by such person in terms of any law or otherwise shall continue to hold the right. Section 28(2) requires every person who claims to hold a right in respect of a land situated in an area referred to in a notice by the minister, to apply for the recognition and registration of such right under the Act. Should the application be rejected that person would lose the right of occupation or use.

[46] The submission by counsel is not supported by the applicant's evidence before the Appeal Tribunal. According to the Appeal Tribunal the applicant's testimony was that he and his family obtained the land at Nansefu from Munyaza Furthermore, Munyaza was allowed to occupy the land at Nansefu by Nankazana (the mother of the second respondent's father). The Tribunal further recorded that Benson Sai Sai Simasiku, a former headman of the Masubia Traditional Authority, with a portfolio of land affairs, testified that after the Masubia Traditional Authority had carried out its investigations it allocated the land to the second respondent during 1996.

[47] The applicant makes a bald statement that the Appeal Tribunal 'overestimated' by which I understand to mean that it placed over reliance on the testimonies of Munyaza and Benson Sai Sai Simasiku. He does however not state in what respect such evidence was over relied upon. The Appeal Tribunal found that the evidence of Benson Sai Sai Simasiku 'was not challenged or contradicted, by the

applicant'. In this regard, Mr Sibeya correctly points out that both Munyaza and Benson Sai Sai Simasiku were independent witnesses.

[48] In my considered view, even if the applicant was correct that the Appeal Tribunal over relied on the evidence of Munyaza and Benson Sai Sai Simasiku, there was nothing wrong with that approach, because they were independent witnesses who appear to have intimate historic knowledge of the disputed land. As mentioned earlier in this judgment, the Appeal Tribunal found that those witnesses evidence was not challenged or contradicted by the applicant. Courts invariably rely on the evidence of independent witnesses especially where other witnesses, like in the present matter, have vested interests in the outcome of the disputed matter.

[49] Having regard to the foregoing, I find that there is no merit in the applicant's argument that that the Appeal Tribunal 'overestimated' the testimonies of Munyaza and Benson Sai Sai Simasiku in arriving at its decision. Accordingly, the point is rejected. I turn to consider the next point.

[50] The applicant is correct in asserting that the power to allocate customary land rights in terms of customary law and in terms of the Act vests in the Chief or Traditional Authority, in this case the Chief of the Masubia. Both the applicant and the second respondent claim that they were in occupation of Nansefu land before the commencement of the Act. Whose version should carry the day?

[51] According to the well-established *Plascon-Evans*[5] rule where there is a genuine dispute of facts, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can safely be rejected on the papers. No suggestion was made that whose version that the second respondent is false and can be rejected on the papers. It follows therefore that the second respondent's version prevails, namely that the land at Nansefu was allocated to the second respondent by the Masubia Traditional Authority during 1996 and thereafter, they remained in occupation until at the time the Act was promulgated and came into force. It is therefore the second respondent's rights to the said land which warrant protection in terms of section 28(1)*(a)*.

[5] *NDPP v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para [26].

[52] Mr Sibeya correctly points out that, if the applicant is relying on the decision of by the Masubia Traditional Authority of 30 August 2013 that that decision was set aside by the Appeal Tribunal on 16 August 2014. Counsel further points out that in the absence of an appeal or review to set aside that decision, it stands. I agree that the decision remains in force until and unless set aside. This is in accordance with the well-established principle in *Oudekraal*[6] to the effect that the exercise of public power must be presumed to be valid and have legal consequences unless and until they are reviewed and set aside.

Conclusion

[53] In conclusion and in summary, I have found that the decision by the Appeal Tribunal of 3 June 2017 was not *ultra vires* the provisions of s 39 read with regulation 25. I found further that the Appeal Tribunal did not become *functus officio* after it had delivered its interim ruling on 16 August 2014. I further found that the applicant was afforded an opportunity by the Appeal Board to place his version before the Tribunal. Finally, I found that the Appeal Tribunal correctly applied the law to the facts in arriving at its decision. The applicant's application therefore stands to be dismissed.

Order

[54] In the result, I make the following order:

1. The application is dismissed with costs.

2. The matter is removed from roll and is finalised.

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H Angula

Deputy-Judge President

[6] *Oudekraal Estate (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26.

APPEARANCES:

APPLICANT:	P MULUTI Of Muluti & Partners, Windhoek
FIRST, THIRD and FOURTH RESPONDENTS:	J NCUBE Of Office of the Government Attorney, Windhoek
SECOND RESPONDENT:	O S SIBEYA Of Sibeya & Partners Legal Practitioners, Windhoek