



Authority's judgment in terms of Section 24(1) of the Communal Land Reform Act, 2002 (Act No.5 of 2002), is hereby set aside.

2. The decision of the second respondent to suspend the customary land right certificate that was granted to the applicant by the first respondent in 2011, is hereby set aside.
3. The decision of the second respondent to refer the matter back to the third respondent for review, is set aside.
4. In the event that the fourth respondent has not dealt with the matter that the second respondent referred to it as aforesaid, the court grants an order directing the fourth respondent not to deal with the matter that relates to the portion of the customary land that was allocated to the applicant, in the alternative, in the event that the fourth respondent has already dealt with the matter, the court grant an order setting aside the proceedings thereof, and, any decision (if any) taken by the fourth respondent that arises from such proceedings.
5. The court grants the applicant leave to eject the fifth respondent from any portion of land that falls within the scope of the approximate size of land prescribed in the applicant's certificate of registration of customary land right that the fifth respondent occupies or uses in any way, and, to remove any implement, equipment and or any item that he may have brought or kept on the aforesaid land, within 21 days from date of this Court's order.
6. In the event that the fifth respondent refuses to vacate the aforesaid land, or, fails in any way to vacate the aforesaid land, and or, refuses or fails to remove any implement, equipment and or any item that he may have brought or kept on the aforesaid land, within the 21 days as ordered by the court, the Deputy Sheriff for the Magisterial district of Katima Mulilo is directed to immediately evict the fifth respondent from the aforesaid land and to remove and dispose off in any manner any implement, equipment and or any item that the fifth respondent may have brought or kept on the aforesaid land.
7. In the event that it is found that the fifth respondent occupies or uses the aforesaid land intermittently and he is not occupying or using the aforesaid land at the time when this application is heard by this Honorable court, the court grants an order interdicting the fifth respondent from occupying or using the aforesaid land in any

manner in the future.

8. The second respondent is hereby directed to forthwith comply with the request of the Appeal Board and to forward such investigations and other documents as requested to the Appeal Board to be dealt with.

9. No order as to costs.

#### **Reasons for orders:**

##### Introduction

[1] The applicant brought a review application which application is not opposed by the respondents. The review seeks to challenge the legality of the decisions made by the second respondent as the said decisions violate her customary land rights to a portion of land situated in the Lusese area in the Zambezi region. She further seeks declaratory relief with regard to a decision by the second respondent made in 2011 which allocated Customary Land Rights to her as well as an eviction order against the fifth respondent in that the fifth respondent is unlawfully occupying a portion of the communal land that was allocated to the applicant.

##### Background

[2] During 2010 the applicant applied to the Masubia Traditional Authority (fourth respondent) in terms of Section 22 of the Communal Land Reform Act, 2 of 2002 for the allocation of a customary land right. During this process the fifth respondent, Mr James Muchila raised a claim to the same piece of land which formed the subject matter of the applicant's application to the fourth respondent. The fourth respondent consulted in terms of Section 22(3) of the Act and held a hearing as provided for in Section 22(3)(a) of the Act. The matter was resolved in the favour of the applicant and she was allotted a portion of communal land in the Lusese communal area in the Zambezi region.

[3] After this allotment, the fifth respondent appealed to the Appeals Tribunal in terms of Section 39 of the Communal Land Reform Act. The appeal was heard and the allotment made by the fourth respondent was upheld. Subsequent to the decision of the Appeals Tribunal, the second respondent ratified the allocation of the said land and it registered the right in its register and issued the applicant with a Certificate of

Registration of Customary Land Right dated 7 October 2011.

[4] In 2018 the applicant received a letter inviting her to a hearing on 14 December 2018, from the second respondent. No hearing took place on that day as the witnesses for the fifth respondents were not present and the matter proceeded in October 2019, when the first respondent took the decision now subject to review. The applicant was informed in a letter dated 6 December 2019 that the second respondent does not ratify the Masubia Traditional Authority Judgement in terms of Section 24(1) of the Communal Land Reform Act, 5 of 2002 and that the applicant's customary land right certificate is suspended and the matter referred back to the Masubia Traditional Authority, the fifth respondent for review.

#### The decision of the second respondent

[5] The initial decision to approve the registration of a customary land right by the second defendant lead to the issuing of a certificate of registration of customary land right, as per Section 25 of the Communal Land Reform Act and regulation 5 issued in terms of the said act, by the second respondent dated 7 October 2011. In the letter dating 30 November 2018, the Secretary to the Zambezi Communal Land Board wrote to the applicant and informed her that the Board received a letter from the Appeal Tribunal, requesting the second respondent to re-investigate the land dispute between the applicant and the fifth respondent and to pronounce itself on the matter. The applicant was invited to a hearing before the second respondent and was informed in writing of the second respondent's finding.

[6] In the letter dated 11 November 2019, the second respondent informed the applicant that they took into account all the deliberations, testimonies made and analyzed the map produced during the hearing of 23 October 2019 and they came to a conclusion that the fifth respondent, Mr James Muchila was not involved from the start of the process as the Lusese sub-khuta failed to engage both families involved in the land dispute and only considered the input of one party, the applicant. The Lusese Khuta member who further represented the Masubia Traditional Authority was conflicted and Mr. Greenwell Mayumbele who was the prime witness for the Masiye family, was not present during the hearing. As such, the exclusion of the Machila family by the Masubia Traditional Authority created reasonable grounds to doubt the validity and authenticity of the claim of the

applicant to the disputed parcel of land.

[7] For that reason the Board resolved that it did not ratify the Masubia Traditional Authority judgement in terms of section 24(1) of the Communal Land Reform Act, 5 of 2002 and the applicant's customary land right certificate was suspended and the matter was referred back to the Masubia Traditional Authority for review.

#### The arguments

[8] It was argued that at the time the second respondent took all the impugned decisions, it lacked lawful authority in law to review and or reconsider the matter as the second respondent misconstrued the nature of its powers under the act and its obligations under the Namibian Constitution and therefore the decision to suspend the certificate of registration violates the provisions of section 26(1) of the Act.

[9] It is submitted that once the second respondent has acted in terms of the afore quoted provisions of the Act in determining and ratifying the allocation of a specific customary land right that was granted to a person, the second respondent becomes functus officio and on its own, it no longer has any legal authority in law to again revert to that allocation with a view to determine the validity of the allocation as well as the validity and or effect of the ratification of that allocation.

#### Legal considerations

[10] In terms of section 3 of the Act, the functions of the second defendant are as follows:

'Subject to the provisions of this Act, the functions of a board are -

- (a) to exercise control over the allocation and the cancellation of customary land rights by Chiefs or Traditional Authorities under this Act;
- (b) to consider and decide on applications for a right of leasehold under this Act;
- (c) to establish and maintain a register and a system of registration for recording the allocation, transfer and cancellation of customary land rights and rights of leasehold under this Act;
- (d) to advise the Minister, either of its own motion or at the request of the Minister, in connection with the making of regulations or any other matter pertaining to the objectives of this Act; and
- (e) to perform such other functions as are assigned to a board by this Act.'

[11] Section 20 of the Act identifies the person in whom the power to allocate or cancel

customary land rights is vested. The primary power to allocate or cancel customary land rights is vested in the Chief of a traditional community, or if the Chief so decides, in the Traditional Authority of a particular traditional community. This means that the Chief or Traditional Authority must first decide whether or not to grant an ratification for a customary land right. Only once the decision is made will the matter be referred to the Communal

Land Board for ratification of the decision by the Chief or Traditional Authority.

[12] The process for the ratification of a customary land right by the board is set out in section 24 and section 25 of the Act. It reads as follows:

'(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 it is 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.'

[13] From reading the Act, it seems that the next step that the Board takes, if it completes the process under section 24 of the act, is to move for the registration of customary land right in terms of section 25 of the Act. This section reads as follows:

'(1) If a board ratifies the allocation of a customary land right under section 24(4)(a) it must-

- (a) cause such right to be registered in the prescribed register in the name of the person to whom it was allocated; and
- (b) issue to that person a certificate of registration in the prescribed form and manner.

[14] A party aggrieved by the decision of the Traditional Authority or headman can, in the prescribed manner, can appeal against that decision to an appeal tribunal appointed by the Minister for the purpose of the appeal concerned in terms of section 30. The appeal tribunal may confirm, set aside or amend the decision which is the subject of the appeal or make any order in connection therewith as it may think fit.

[15] The requirement to determine whether there was indeed a right allocated to the applicant, which must be determined in the first instance, is set out in *Mbai v Minister of Land Reform*<sup>1</sup> as follows:

'(T)he applicant must have been allocated some form of customary land right in terms of s 22 by the chief or the traditional authority. The chief or the traditional authority must have subsequent to the application, allocated that right to the applicant and such allocation must have been ratified by the board. For only the act of ratification by the board bestows a right upon an applicant in terms of the Act.'

[16] As soon as an administrative decision is made, the parties making the decision becomes *functus officio*. In this instance the traditional authority or chief<sup>2</sup> as well as the Communal Land Board would be *functus officio* after taking the 2010-2011 decision to allocate the piece of land to the applicant. In a discussion by, and under the heading 'the essence of *functus officio* doctrine', Damaseb JA in *Hashagen v Public Accountants and Auditors Board*<sup>3</sup> described the principle as follows:

'An administrative decision is deemed to be final and binding once it is made. Once made, such a decision cannot be re-opened or revoked by the decision maker unless authorised by law, expressly or by necessary implication. The animating principle for the rule is that both the decision maker and the subject know where they stand. At its core, therefore, are fairness and certainty.'

<sup>1</sup> *Mbai v Minister of Land Reform* (HC-MD-CIV-MOT-GEN-2017/00415) [2020] NAHCMD 425 (18 September 2020).

<sup>2</sup> *Supra*.

<sup>3</sup> *Hashagen v Public Accountants and Auditors Board* 2021 (3) NR 711 SC at 27E - 28H.

[28] As Pretorius<sup>4</sup> aptly observes:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person’s legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

[29] What that means then is that once an administrative body has exercised an administrative discretion in a specific way in a particular case, it loses further jurisdiction in the matter. It cannot go back on it or assume power again in respect of the same matter between the same parties.’

### Discussion

[17] The onus rest on the applicant for review to satisfy the court that good grounds exist to review the conduct complained of. Good grounds are grounds that are cogent and relevant. The applicant’s grounds of review are set out in her founding affidavit filed of record. There were four questions identified which the court needs to answer in the process of coming to a conclusion in this matter. They are:

- ‘1. Whether at the time the second respondent took all the impugned decisions, it lacked lawful authority in law to review and or reconsider the matter?
2. Whether at the time the second respondent took all the impugned decisions, the second respondent misconstrued the nature of its powers under the Act and its obligations under the Namibian Constitution?
3. Whether the decision to suspend the certificate of registration violates the provisions of section 26 (1) of the Act?
4. Whether the second respondent acted arbitrarily or irrationally?’

[18] From the reading of the applicant’s affidavit, it is clear that a right was allocated to her as per the prescribed process in the Act, and she indeed received a Certificate of Registration of Customary Land Right, recognising the allocation of the specific right.

[19] It is also so that the second respondent was satisfied with the recommendation

<sup>4</sup> DM Pretorius: *The Origin of the functus officio doctrine, with specific reference to its application in Administrative Law*, 2005 SALJ Vol. 122 at 832-833.



from the Traditional Authority regarding the allocation of the disputed land portion to the Applicant as they proceeded and issued her with a certificate in terms of Section 25 of the Act, certificate No. CCLB-001095. This certificate was issued after the matter was referred to the appeal tribunal and the allocation by the Traditional Authority of the piece to the applicant was upheld at the said hearing. It is therefore clear that the second respondent must have conducted such investigations and enquiries it deemed necessary when the matter was initially referred to them in 2011, before the Certificate of Registration of Customary Land Right was issued by them.

[20] Furthermore, when the second respondent took the decision in 2019 to suspend the certificate of registration of customary land right in respect of the applicant it had no powers in terms of any provisions of the act to do so. The only power to revoke or cancel a customary land right rests, in terms of section 27 of the Act, with a Chief or Traditional Authority in accordance with customary law, if the holder of the right fails to observe in a material respect any condition or restriction attached to the right under the Act or if the land is being used predominantly for a purpose not recognised under customary law or on any other ground as may be prescribed. Such cancellation will then need to be ratified by the relevant Board.

[21] It is also evident from the record that an Appeal Tribunal in terms of Section 39(6) and Regulation 25 of the Communal Land Reform Act, 2002 (Act No. 22 of 2002) was appointed and the sixth respondent was the Chairperson of the Appeal Tribunal. It is further evident that the Appeal Tribunal referred the matter back to the second respondent to reinvestigate and to provide accurate minute taking of interviews and meetings conducted. The Appeal Tribunal further resolved that the second respondent should record and forward the investigation findings to the Appeal Tribunal, in order to enable the Appeal Tribunal to finalize its judgment. The decision and actions of the second respondent not to ratify the fourth respondent's judgement and suspend the applicant's customary land right certificate and referred back the matter to the fourth respondent for review, is also not in line with the request received from the Appeal Tribunal.

[22] When the second respondent initially issued the Certificate of Registration of Customary Land Right, it became *functus officio* as it already dealt with the considerations under section 24 of the Act before it issued a certificate under section 25

of the Act and it can therefore not revoke its previous ratification and now refer the matter back to the fourth respondent. The fourth respondent in any event also became *functus officio* after it referred the matter to the fourth respondent and can only cancel the customary land right in very specific circumstances as set out under section 27 of the Act.

[23] I therefore make the following order:

1. The decision of the second respondent to not to ratify the Masubia Traditional Authority's judgment in terms of Section 24(1) of the Communal Land Reform Act, 2002 (Act No.5 of 2002), is hereby set aside.
2. The decision of the second respondent to suspend the customary land right certificate that was granted to the applicant by the first respondent in 2011, is hereby set aside.
3. The decision of the second respondent to refer the matter back to the third respondent for review, is set aside.
4. In the event that the fourth respondent has not dealt with the matter that the second respondent referred to it as aforesaid, the court grants an order directing the fourth respondent not to deal with the matter that relates to the portion of the customary land that was allocated to the applicant, in the alternative, in the event that the fourth respondent has already dealt with the matter, the court grant an order setting aside the proceedings thereof, and, any decision (if any) taken by the fourth respondent that arises from such proceedings.
5. The court grants the applicant leave to eject the fifth respondent from any portion of land that falls within the scope of the approximate size of land prescribed in the applicant's certificate of registration of customary land right that the fifth respondent occupies or uses in any way, and, to remove any implement, equipment and or any item that he may have brought or kept on the aforesaid land, within 21 days from date of this Court's order.
6. In the event that the fifth respondent refuses to vacate the aforesaid land, or, fails in any way to vacate the aforesaid land, and or, refuses or fails to remove any implement, equipment and or any item that he may have brought or kept on the aforesaid land, within the 21 days as ordered by the court, the Deputy Sheriff for the Magisterial district of Katima Mulilo is directed to immediately evict the fifth respondent from the aforesaid land and to remove and dispose off in any manner

any implement, equipment and or any item that the fifth respondent may have brought or kept on the aforesaid land.

7. In the event that it is found that the fifth respondent occupies or uses the aforesaid land intermittently and he is not occupying or using the aforesaid land at the time when this application is heard by this Honorable court, the court grants an order interdicting the fifth respondent from occupying or using the aforesaid land in any manner in the future.
8. The second respondent is hereby directed to forthwith comply with the request of the Appeal Board and to forward such investigations and other documents as requested to the Appeal Board to be dealt with.
9. No order as to costs.

<b>Judge's signature</b>	<b>Note to the parties:</b>
Rakow J Judge	Not applicable.
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondents</b>
C Mayumbelo of Chris Mayumbelo & Co.	<i>No opposition</i>