

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2021/00349

In the matter between:

BORNFACE MAJANGA NUMWA

APPLICANT

and

VILYO NDAPOPIWA N.O

FIRST RESPONDENT

ZAMBEZI COMMUNAL LAND BOARD

SECOND RESPONDENT

MINISTER OF AGRICULTURE,

WATER & LAND REFORM

THIRD RESPONDENT

MAFWE TRADITIONAL AUTHORITY

FOURTH RESPONDENT

CLEMENT MWILIMA

FIFTH RESPONDENT

REGINAH BWIZA MWILIMA

SIXTH RESPONDENT

Neutral citation: *Numwa v Ndapopiwa N.O.* (HC-MD-CIV-MOT-REV-2021/00349)
[2022] NAHCMD 678 (09 December 2022)

Coram: USIKU J

Heard: 09 June 2022

Delivered: 09 December 2022

Flynote: Review – Decision of a land appeal tribunal established in terms of s 39 of the Communal Land Reform Act, No. 5 of 2002 – Court holding that the appeal tribunal went outside the scope of its powers when it conducted a hearing *de novo* –

Court bases its finding on procedure followed and not on whether judgment of the appeal tribunal was correct.

Summary: The fifth and sixth respondents appealed to the Land Appeal Tribunal against a decision made by the Zambezi Land Board. In determining the appeal the tribunal conducted a hearing *de novo* and made a decision upholding the respondents' appeal. Aggrieved by the procedure adopted by the Land Appeal Tribunal, the applicant brought a review application seeking an order reviewing a setting aside the decision of the appeal tribunal. The court found that the appeal tribunal acted beyond the scope of its powers when it conducted a hearing *de novo*.

ORDER

1. The decision of the first respondent, the Land Appeal Tribunal, as contained in its judgment dated 13 November 2020, is hereby reviewed and set aside.
 2. The fifth and the sixth respondents are ordered to pay the applicant's costs of suit, jointly and severally, the one paying the other to be absolved.
 3. The matter is removed from the roll and it regarded finalised.
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JUDGMENT

USIKU J

Introduction

[1] In the present matter, the applicant seeks an order reviewing and setting aside the decision of a Land Appeal Tribunal¹ ('Appeal Tribunal'), delivered in on 13 November 2020. The aforesaid decision was made in favour of the fifth and sixth respondents in the present proceedings, against the applicant. The decision sought to be reviewed and set aside reads as follows:

¹ The appeal tribunal was established by the Minister of Land Reform in terms of s39 of the Communal Land Reform Act, No.5 of 2002.

'1 The appeal is upheld.

2. Ms Reginah Bwiza Mwilima's certificate of registration of recognition of existing customary land right was procedurally issued and should not be cancelled or revoked by the second respondent (Mafwe Traditional Authority).

3. No order as to costs made.'

[2] The fifth and the sixth respondents oppose the application. In this judgement I shall refer to the fifth and the sixth respondents as 'the respondents'.

Background

[3] The applicant and the respondents are embroiled in a dispute over a certain portion of land situated in the Masokotwane communal area. Both parties claim to hold communal land rights over the disputed portion of land.

[4] The dispute was reported to the Mafwe Traditional Authority, which resolved the dispute in favour of the applicant.

[5] Aggrieved by the decision of the Mafwe Traditional Authority, the respondents took the dispute to the Zambezi Communal Land Board. The Zambezi Communal Land Board upheld the decision of the Mafwe Traditional Authority.

[6] The respondents then appealed to the Appeal Tribunal against the decision of the Zambezi Communal Land Board.

[7] On 18 September 2020, the Minister of Agriculture, Water and Land Reform ('the Minister') appointed members of the Appeal Tribunal.² On 24 September 2020, the chairperson of Appeal Tribunal set the appeal down for hearing for the 12 October 2020.³

[8] The appeal hearing was then heard on 12 October 2020. It is common cause that at the hearing, the Appeal Tribunal called for fresh evidence, cross-examined

² Letter of appointment at p58 of the Review Record.

³ Notice of set down at p59 of the Review Record.

witnesses and embarked upon a fact finding process. Thereafter, the Appeal Tribunal made the decision as more fully set out in para1 hereof.

[9] The applicant, dissatisfied with the decision of the Appeal Tribunal, approached this court seeking an order reviewing and setting aside the aforesaid decision.

The review application

[10] The applicant seeks the review and setting aside of the decision of the Appeal Tribunal on the following grounds:

- (a) the Appeal Tribunal did not determine the appeal within the confines of s39 of the Communal Land Reform Act, No.5 of 2002 ('the Act'). The Appeal Tribunal called for evidence to be led, cross-examined witnesses and embarked on a fact finding mission to establish how the disputed portion of land was allocated. In doing so, the Appeal Tribunal went beyond the scope and powers conferred upon by the Act;
- (b) the Appeal Tribunal is required to hear the appeal within 30 days from the date it received the appeal. The appeal was noted in March 2020 but the hearing only took place in October 2020. In terms of Regulation 25⁴ the Appeal Tribunal is required to hear the appeal with 30 days from the date it received the appeal. On that ground its decision must be reviewed and set aside.

[11] The applicant also set out other two grounds, to the effect that since the Appeal Tribunal conducted a hearing *de novo*, it:

- (a) misconstrued its powers under the Act and under the Namibian Constitution; and,
- (b) acted arbitrarily or irrationally. Since these last grounds are intertwined with the issue of whether or not the Appeal Tribunal has powers to conduct a hearing *de novo*, I shall confine myself to the first two major grounds.

The opposition

⁴ Of the Regulations made in terms of Communal Land Reform Act, No.5 2002, promulgated under Government Notice of 2003 (GG 2926).

[12] The respondents contend that there is nothing in the Act or the Regulations, that prohibits the Appeal Tribunal from conducting a re-hearing on the merits of the subject matter of the appeal before it. The respondents submit that they were not afforded an opportunity to make representations to the Traditional Authority and to the Communal Land Board. Therefore, it was essential that a new hearing be conducted by the Appeal Tribunal.

[13] The respondents further submit that the appeal was heard within 30 days after the establishment of the Appeal Tribunal. According to the respondents, the members of the Appeal Tribunal were appointed on 10 September 2020 and the hearing took place on 12 October 2020.

Analysis

[14] In my opinion, the principal issues for determination in this matter are whether:

- (a) the Appeal Tribunal is empowered to conduct an appeal by calling for fresh evidence, by way of witnesses and cross-examination thereof and to embark on a fact finding mission, and whether,
- (b) the appeal was heard outside 30 days period prescribed by the Regulations.

Whether the appeal Tribunal has powers to conduct a hearing *de novo*.

[15] Section 39 of the Act deals with appeals. Section 39(1) reads as follows:

‘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.’

[16] Section 39(6) deals with the powers of Appeal Tribunal, and reads as follows:

- ‘(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.’

[17] In the matter of *Tikly v Johannes NO*⁵, Trollip J, observed that the word 'appeal' can have different connotations and it may mean:

- (a) a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information ('an appeal in the evidence wide sense'), or it may mean,
- (b) a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given and in which the only determination is whether that decision was right or wrong ('an appeal in the strict sense').

[18] Whether the 'appeal' referred to in s 39(1) is 'an appeal in the wide sense' or 'an appeal in the strict sense', is to be determined from the context it is used in the Act.

[19] Section 37 of the Act deals with 'preliminary investigation of claim to existing rights'. The section empowers the Minister, in consultation with a communal land board, to establish for that board, an investigating committee. The board may direct the investigating committee to conduct preliminary investigations to establish the circumstances concerning:

- (a) the occupation, use or control of the land by a person concerned, or
- (b) any other matter which the board itself may investigate in terms of the provisions of the Act or which may be directed by the board.

[20] From the provisions of s 37, it appears to me that the investigating and evidential powers are conferred by the Act on the communal land boards, which may be exercised through the investigating committees.

[21] I am of the opinion that the Act does not confer identical or similar investigative and evidential powers upon the Appeal Tribunal. From the foregoing, I conclude that it is not the intention of the Act that the Appeal Tribunal conducts hearings *de novo*.

⁵ 1963 (2) SA 588 at 590 G-H.

[22] In the case of *Ngaujake v Minister of Land Reform*⁶, Masuku J, dealing a similar issue on the interpretation of s39, observes in the context of that case, that an appellate body does not have power to go beyond the record of proceedings and where it considers the record to be deficient, it has no power to call evidence of its own motion as it lacks the powers at law to do so.

[23] I am in support of the foregoing remarks, and I am of the view that those remarks are applicable to the present matter.

Whether the appeal was heard outside the 30 days period prescribed by Regulation 25

[24] Regulation 25(5) provides that an Appeal Tribunal 'must hear an appeal within 30 days after the date from which it has received the appeal'.

[25] The crucial issue on this aspect is the time when the Appeal Tribunal 'received' the appeal. As it was alluded to earlier, the Minister appointed the members of the Appeal Tribunal on 18 September 2020. On 24 September 2020, the Chairperson of the Appeal Tribunal set the appeal down for hearing for the 12 October 2020 and the appeal was heard on that date. The 12 October 2020 falls within the 30 days period, even if one assumes that the Appeal Tribunal received the appeal on the same day on which its members were appointed. For the foregoing reason, I am of the view that the ground for review on the basis that the appeal was heard within 30 days, has no merits and falls to be dismissed.

Conclusion

[26] I am of the view that 'appeal' in the context of s 39(1) does not empower the Appeal Tribunal to conduct a complete re-hearing of the matter, as it did in the present case. By doing so, the Appeal Tribunal acted outside the scope of its powers as conferred upon it by the provisions of s 39 of the Act. For that reason, the decision of the Appeal Tribunal cannot be allowed to stand and is to be reviewed and set aside.

⁶ Case No. HC-MD-CIV-MOT-REV-2018/00426 [2021] NAHCMD 38 (11 February 2021) at para 33.

[27] As regards the issue of costs, I am of the view that the general rule that costs follow the event must find application in this matter.

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

1. The decision of the first respondent, (the Appeal Tribunal) as contained in its judgment dated 13 November 2020, is hereby reviewed and set aside.
2. The fifth and the sixth respondents are ordered to pay the applicant's costs of suit, jointly and severally, the one paying the other to be absolved.
3. The matter is removed from the roll and it regarded finalised.

B USIKU
Judge

APPEARANCES:

APPLICANT: C Mayumbelo
Of Chris Mayumbelo & Co., Windhoek

FIFTH & SIXTH
RESPONDENTS: SS Makando
Of Adv. SS Makando Chambers, Windhoek