



REPORTABLE

CASE NO: SA 81/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**CHAIRMAN OHANGWENA COMMUNAL LAND
BOARD N.O.**

**App
ellant**

and

TILEINGE WAPULILE

Respondent

Coram: SHIVUTE CJ, MAINGA JA and O'REGAN AJA

Heard: 8 April 2016

Delivered: 8 June 2017

Summary: The appellant (Ohangwena Communal Land Board) and the respondent (Tileinge Wapulile) had been embroiled in a protracted dispute over the fence around Odjele Grazing Farm. After unsuccessful engagement with the respondent the appellant invited the respondent to its headquarters at Eenhana during October 2012. On respondent's arrival he was served with a letter headed 'Notification order to remove the fence'. The notification required the respondent to remove the perimeter fence around the Odjele Grazing Farm within 30 days of receipt of the letter. Subsequent to the notification, respondent contacted his legal

representatives and the Ondonga Traditional Authority that had granted the respondent the right to occupy the Grazing Farm. The Chief invited the Minister of Lands and Resettlement to his Palace and the Minister was requested to stop the removal of the fences. With the interventions of the Chief and his lawyers and the fact that the 30 days notification had expired without any action from the appellant, respondent thought all was well. On 26 July 2013 officials from the Ministry of Lands accompanied by Police officers arrived at the respondent's farm and started dismantling the fence.

Respondent, on 6 August 2013 made an urgent application to the High Court for an order interdicting the appellant from dismantling his fences and disposing the material used for the erection of such fences on Odjele Grazing Farm which farm fall within the communal area of the Ondonga traditional community. Respondent is a subject of that community. The farm was allocated to the respondent by the Ondonga Traditional Authority in the late 1980's. That allocation of the farm was confirmed on 7 August 1996 in a letter from the Ondonga Traditional Authority which states that the Authority 'gave permission' to respondent 'to own the farm known as Odjele Grazing Farm on 2 September 1988. Relying on ss 18 and 28(2) (b) and (3) of the Communal Land Act 5 of 2002 (the Act), the respondent alleged that the removal of the fence around his grazing farm was unlawful. He maintained that he had applied to the relevant board (Oshikoto Communal Land Board) in terms of s 28(2) for the recognition and registration of the right in respect of the occupation of the farm and for the authorisation for the retention of the fence existing on the farm.

It is common cause that the Grazing Farm is situated in Ohangwena Region and therefor falls under the jurisdiction of the appellant. Respondent had not applied to the appellant for authorisation for the retention of the fence existing on the farm, notwithstanding reminders to that effect by the appellant. It was also common cause that the Minister of Lands and Resettlement acting in terms of s 28(3) extended the time periods contemplated in s 28(2) from time to time. In GN 19 the Minister extended the period with effect from 1 March 2014 indefinitely. Respondent's case in the High Court was founded amongst other things, on the ground that he had applied to the relevant board (Oshikoto Communal Land Board) during 2005/2006 and he was still awaiting for the reply and that the period for making applications contemplated in terms of s 28(2) had not yet expired at the time the appellant dismantled his fence. Section 18 prohibits the erection of fences on land in a communal land area. The exemptions from this prohibition made by the Minister in terms of the Regulations (26 and 27(3) published in GN 37 of 1 March 2003 are fencing in homesteads, cattle pens, water troughs or crop fields. Section 28(1) protects any existing customary land right held by a person in respect of the occupation or use of communal land, unless such person's claim to the right is rejected upon application contemplated in s 28(2) or such land reverts to the State by virtue of s 28(13).

On 9 August 2013 the High Court issued a *rule nisi*, incorporating an interim interdict. On 15 November 2013, by virtue of the provisions of s 28 and the fact that, at the time the respondent's fence was dismantled the period of making applications contemplated in s 28(2) had not expired, amongst other things, the High Court confirmed the rule and granted the relief as prayed for by respondent.

On appeal the question arose whether the operation of s 18 is suspended in the period when an application for retention of a fence in terms of s 28(2) has not been made, although such an application may still be made because the time for making of such applications has not yet elapsed.

The court recognised the tension between the provisions of ss 18 and 28 and held that the provisions of s 18 are not suspended, the prohibition remains operative whenever there is no application pending before the relevant Board.

Held that the Minister can only extend the period within which the applications may be made, the obligations to apply in terms of s 28(2) remains, in force.

Held that the prohibition in s 18 persists in the absence of an application before the relevant Board; notwithstanding the extension of time granted by the Minister.

Held that the respondent did not have an application pending before the relevant board (Ohangwena Communal Land Board) when the appellant dismantled his fence and the appellant cannot be faulted for having dismantled the fence.

Held that consequently the respondent's application (interdict) should have been refused in the High Court.

Held that the order of the High Court set aside and replaced with the following order.

The *rule nisi* discharged. Appeal succeeded with costs.

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and O'REGAN AJA concurring):

[1] This appeal concerns a perimeter fence erected around a piece of communal land ('the grazing farm') measuring 4354.8 hectares at the Odjele Village, Okongo constituency, in the Ohangwena Region under the jurisdiction of the appellant. The grazing farm, was according to the respondent, allocated to him by the Ondonga Traditional Authority in the late 1980s. According to respondent, this was confirmed on 7 August 1996 in a letter from the Ondonga Traditional Authority which states that the Authority "gave permission" to respondent "to own the farm known as Odjele Grazing Farm" on 2 September 1989.

[2] During October 2012 the respondent was invited by the appellant to its headquarters in Eenhana. Upon his arrival, he was served with a letter dated 30 August 2012 titled 'Notification order to remove the fence'. The notification required the respondent to remove the perimeter fence around the grazing farm within 30 days of receipt of the letter. In terms of para 3 of the letter, the respondent was entitled to appeal to the Permanent Secretary of the Ministry of Lands and Resettlement ('the Ministry') within 30 days from receipt of the letter. Subsequent to the notification, the respondent contacted his legal practitioners of record and the Ondonga Traditional Authority that had originally granted the

respondent the right to occupy the grazing farm. On 5 November 2012, the respondent's legal practitioners addressed a letter to the appellant seeking the record of the decision taken on 30 August 2012. On 20 December 2012, the King¹ of the Ondonga Traditional Authority invited the Minister of Lands and Resettlement ('the Minister') to his palace on an urgent basis to discuss disputes that had arisen between the appellant and communal farmers under the authority of the Ondonga Traditional Authority who fell within the jurisdiction of the appellant. Eventually on 11 February 2013, the Minister visited the Chief at his palace and the issue of the fences was discussed and the Minister was requested to stop the process of removing the fences. With these interventions from the respondent's legal practitioners and the Chief and the fact that the 30 days period had expired without any action from the appellant, the respondent thought all was well.

[3] However, on 26 July 2013 officials from the Ministry accompanied by police officers arrived at the respondent's farm and started dismantling the fence.

[4] On 6 August 2013 the respondent (applicant then) made an urgent application to the High Court seeking the following relief:

2.

'2.1 Interdicting and restraining the Ohangwena Communal Land Board from removing applicant's fences and from disposing the material used for the erection of such fences on Odjele Grazing Farm situated in Onalusheshete, Ondonga traditional district.

¹ The King of the Ondonga Traditional Authority as he is addressed by his Traditional Authority is recognised as a Chief in terms of s 6 of the Traditional Authorities Act 25 of 2000. Consistent with the Traditional Authority Act I will refer to him as Chief of the Ondonga Traditional Authority.

- 2.2 Interdicting and restraining the Ohangwena Communal Land Board from in any way taking any further steps towards the implementation of any decision taken by it to remove applicant's fences and from disposing the material used for the erection of applicant's fences or in any way whatsoever damaging applicant's fences erected on the aforesaid Odjele Grazing Farm.
 - 2.3 Ordering the Ohangwena Communal Land Board to restore applicant's fences already removed at the aforesaid Odjele Grazing Farm to its original state.
 - 2.4 Ordering the Ohangwena Communal Land Board to pay the costs of this application.
 - 2.5 Granting the applicant such further or alternative relief as this Honourable Court deems fit.
3. Ordering that subparagraphs 2.1 and 2.2 supra operate with immediate effect as an interim order and interdict pending the return date.'

[5] On 9 August 2013 the High Court issued a *rule nisi* incorporating para 3 of the relief sought.

[6] On 15 November 2013 in a written judgment the High Court confirmed the *rule nisi*. The court below found that the respondent had established that he had erected the perimeter fence by 1990 or at least prior to the coming into force of the Act. The court also accepted that the respondent intended to apply for authorisation for the retention of the perimeter fence – which he could still do (during 2013) until the end of February 2014. The court further found that s 18 of the Communal Land Reform Act 5 of 2002 ('the Act') read with s 28 contemplates

that persons may apply to retain fencing erected prior to the coming into force of the Act before February 2014. The court held that, given the entitlement to retain a fence if the statutory requisites in s 28(8) are met, it was unlawful for boards to remove such fencing where applicants intend to make such applications prior to the expiration of the period set by the Minister pursuant to s 18.

Appellant's arguments

[7] The appellant appeals against the whole of the judgment and the orders, including the cost order. Its main argument is that the respondent's case and the judgment of the High Court are founded on a misconception of the governing statute, the Act, and in particular s 28 of the Act insofar as it deals with fences that existed prior to the commencement of the Act. The appellant contends that the High Court misconstrued the relevant sections by finding that because the time for lodging an application for authorisation had not yet lapsed, the removal of the respondent's fence was unlawful. This, the appellant says, is so because the right to retain pre-existing fences is prohibited unless authorisation has been given. The Act limits the period within which applications may be made for authorisation to retain a fence and that the prohibition not to retain pre-existing fences unless authorisation had been granted is not suspended during the period in which application may be made for authorisation but continues to be in force, so argued counsel for the appellant. Appellant further contended that the Act provides protection to those who have applied to the Board for authorisation, but argued that respondent has not applied to the appellant for permission to retain the fence. Appellant argued that it is for the relevant board to authorise the retention of the fence and that accordingly respondent's allegation that he had applied to the

Oshikoto Communal Land Board in 2005/2006 for permission to retain the fence cannot assist the respondent. Appellant also argued that respondent is mistaken when suggesting that he applied to the Oshikoto Communal Land Board because the appellant did not exist in 2005/2006, as the appellant has been in existence at all material times since 2003. Appellant also argued that respondent produced no evidence of its alleged application to the Oshikoto Communal Land Board, so the respondent has not established that he has ever made a valid application for permission to retain the perimeter fence.

[8] Appellant also contended that there are a number of disputes of fact on the papers. Given that the respondent elected to proceed by way of notice of motion for final relief, and not to seek a referral to oral evidence, those factual disputes fall to be resolved on the approach adopted in the *Plascon-Evans* case.² Appellant further argued that the respondent did not have a right to fence the land before the commencement of the Act. Furthermore, appellant argued, given that the grazing farm constituted commonage, even if the Ondonga Traditional Authority had purported to grant a right to erect a perimeter fence, it had not had the authority to do so, given that Reg 10(2) of the Bantu Areas Land Regulations issued on 11 July 1969 prohibited the erection of fencing of commonage. The appellant also submitted that the erection of the fences was unlawful, whenever it took place because no person had the power to authorise the erection of fences on commonage, in breach of the rights of the members of the community. Finally, appellant argued that the application for a final interdict was misconceived in light of the respondent's failure to have the decision of the Board reviewed and set

² *Plascon-Evans Paints LTD v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

aside. Therefore, so counsel argued, the interdict should not have been granted, the appeal should be upheld with costs, and the order of the High Court should be replaced with an order that the *rule nisi* is discharged.

Respondent's arguments

[9] The respondent, for his part, supports the ruling and the reasoning of the court below. Respondent contends that the fence in question is the perimeter fence of the grazing farm which he states is near Odjele. He argues that the location of the fence is crucial as the appellant in its answering affidavits refers to what appear to be other disputes between respondent and appellant. The uncertainty, so it was submitted, as to what areas the appellant is referring to in the answering affidavits, is a factor that must be kept in mind when assessing whether a *bona fide* factual dispute was created on the papers which warranted a referral to oral evidence. It is further contended that the answering affidavits do not distinguish between the perimeter and internal fences. Bearing this in mind, it is submitted that as far as the perimeter fence is concerned, the court below correctly found that there was no *bona fide* factual dispute. It is further submitted that the date referred to in s 28(2) which is common cause had been extended from time to time and the time period for making such applications in terms of s 28(2) had not yet expired when respondent's fence was dismantled. In fact, respondent noted that by Government Notice No 19 of 28 February 2014, the Minister had extended the period referred to in s 28(2) until further notice.

[10] Respondent further submitted that the legislature intended by the provisions of ss 18(b), 28(2)(b), (3) and 37 of the Act to protect the vested rights of

persons like the respondent who had existing fences at the time the Act came into force. As to the issue whether the respondent's allocation of the land in question entitled him to fence it, it was contended on behalf of the respondent that although the letter confirming his entitlement to the land did not explicitly refer to his right to fence the land, the letter nevertheless clearly confers the fullest rights associated with ownership upon respondent which would include the right to erect a perimeter fence. On the issue of the alleged rights of servitude of persons other than the appellant to the land in question, it was argued that there is nothing in the Act which grants the appellant the right to act on behalf of unidentified persons and that the appellant could not rely on Regulations issued on 11 July 1969, and if the appellant intended to rely on the said Regulations, it should have been pleaded. Finally, as to the argument that the respondent should have reviewed the decision of the appellant it was argued that there is no obligation to follow a specific procedure, the common law remedies are discretionary, a party may choose to review, to set aside or correct, interdict or seek a declaratory order against an administrative decision.

Legislative framework

[11] In order to appreciate the arguments on behalf of the parties, one must have some understanding of the relevant statutory provisions regulating the erection of fences in the communal land areas.

[12] 'Commonage' is defined in s 1 of the Act to mean 'that portion of the communal area of a traditional community which is traditionally used for the common grazing of stock'. 'Communal area' in relation to a traditional community,

is also defined in s 1 to mean ‘the area comprising the communal land inhabited by the members of that community’.

[13] The appellant and other Communal Land Boards were established in terms of s 2(1).

[14] Section 17(1) vests all the communal land areas in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities. In terms of s 17(2), no right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.

[15] Section 18 prohibits the erection of fences on land in a communal land area. It provides:

- ’18. Subject to such exemptions as may be prescribed, no fence of any nature –
- (a) shall, after the commencement of this Act, be erected or caused to be erected by any person on any portion of land situated within a communal land area; or
 - (b) which, upon the commencement of this Act, exists on any portion of such land, by whomsoever erected, shall after such date as may be notified by the Minister by notice in the *Gazette*, be retained on such land, unless authorisation for such erection or retention has been granted in accordance with the provisions of this Act.’

[16] In terms of the Regulations published in Government Notice 37 of 1 March 2003, the Minister made exemptions from the prohibition above as follows:

Regulation 26 prescribes that any fence which, at the commencement of the Act, exists on communal land and which is used to fence in homesteads, cattle pens, water troughs or crop fields may be retained on the portion of land concerned.

Regulation 27(3) prescribes that no authorisation is required for the erection of a fence if the holder of a customary land right or of leasehold wants to fence in homesteads, cattle pens, water troughs or crop fields.

[17] By Government Notice No. 46 of 2006 published in Government Gazette of 15 February 2006, the Minister made known that:

'Subject to any exemptions prescribed under section 18 of the Communal Land Reform Act, 2002 (Act No. 5 of 2002), in terms of paragraph (b) of that section that no fence of any nature which existed upon the commencement of that Act on any portion of land situated within a communal land area shall be retained on such land after 28 February 2006, unless authorisation for the erection or retention of any such fence has been granted in accordance with the provisions of the said Act.

[18] Section 28 recognises existing customary land rights and the relevant provisions provides:

'28. (1) Subject to subsection (2), any person who immediately before the commencement of this Act held a right in respect of the occupation or use of communal land, being a right of a nature referred to in section 21, and which was

granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right, unless -

- (a) such person's claim to the right to such land is rejected upon an application contemplated in subsection (2); or
- (b) such land reverts to the State by virtue of the provisions of subsection (13).

(2) With effect from a date to be publicly notified by the Minister, either generally or with respect to an area specified in the notice, every person who claims to hold a right referred to in subsection (1) in respect of land situated in the area to which the notice relates, shall be required, subject to subsection (3), to apply in the prescribed form and manner to the relevant board -

- (a) for the recognition and registration of such right under this Act; and
- (b) where applicable, for authorization for the retention of any fence or fences existing on the land, if the applicant wishes to retain such fence or fences.

(3) Subject to section 37, an application in terms of subsection (2) must be made within a period of three years of the date notified under that subsection, but the Minister may by public notification extend that period by such further period or periods as the Minister may determine.'

[19] In Government Notice (GN) No 45 of 2006 published in Government Gazette (GG) No 3591 dated 15 February 2006, the Minister in terms of ss 2 of s 28 of the Act made known that with effect from 12 January 2006, every person who claims to hold a right referred to in subsection (1) of that section in respect of the occupation or use of any communal land, being a right of a nature referred to in section 21 of that Act, and which was granted to or acquired by such person in

terms of any law or otherwise, shall be required to apply in the prescribed form and manner to the relevant Communal Land Board established under section 2 of that Act-

- (a) for the recognition and registration of such right under that Act; and
- (b) where applicable, for authorisation for the retention of any fence or fences.

An application in terms of subsection (2) of section 28 of the Communal Land Reform Act, 2002, must be made within three years from the date of publication of this notice in the *Gazette*.

[20] In GN No 19 of 2009, published in GG No 4210 dated 16 February 2009, the Minister, under ss 3 of s 28 of the Act, with effect from 1 March 2009, extended the period within which an application for recognition of existing customary land rights in terms of ss 2 of s 28 as referred to in the GN No 45 of 15 February 2006 to the end of February 2012.

In GN 140 published in Government Gazette 4958 of 1 June 2012, the Minister further extended the period with effect from 1 March 2012 to the end of February 2014.

In GN 19 published in GG 5416 of February 2014 the Minister further extended the period with effect from 1 March 2014 until further notice.

[21] Section 37 provides for preliminary investigation of claim to existing rights. Subsection 2 provides:

'(2) Notwithstanding sections 28 and 35 and the period allowed for applications referred to in subsection (2) of both those sections, if a board has not yet determined an application in respect of land occupied, used or otherwise controlled by a person and enclosed with a fence, irrespective whether an application has been made, the board may at any time direct an investigating committee referred to in subsection (1) to conduct a preliminary investigation to establish the circumstances concerning -

(a) the occupation, use or control of the land by that person;

(b) the existence of the fence on the land; and

(c) any other matter which the board itself may investigate in terms of either of those sections or which may be indicated by the board.'

[22] Section 44 provides:

'Fences

44. (1) Any person who, without the required authorisation granted under this Act, and subject to such exemptions as may be prescribed -

(a) erects or causes to be erected on any communal land any fence of whatever nature; or

(b) being a person referred to in section 28(1) or 35(1), retains any fence on any communal land after the expiry of a period of 30 days after his or her application for such authorisation in terms of section 28(2)(b) or 35(2)(b) has been refused,

is guilty of an offence and on conviction liable to a fine not exceeding N\$4000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(2) If the offence for which a person is convicted in terms of subsection (1) is continued after the conviction, such person is guilty of a further offence and

on conviction liable to a fine not exceeding N\$50 for every day on which the offence is continued.

(3) If any fence is found to be on any communal land in contravention of subsection (1), the Chief or Traditional Authority or the board concerned may, in accordance with the prescribed procedure, cause such fence to be removed and may dispose of the material used for the erection of the fence in such manner as may be prescribed.

(4) Any costs incurred in connection with the removal of a fence in terms of subsection (3) may be recovered from the person who erected or retained such fence in contravention of subsection (1).'

Issue for decision

[23] The question which arises for determination is whether the High Court was correct in granting the interdict against the appellant.

[24] From the papers before court, the grazing farm appears to fall within the communal area of the Ondonga Traditional Community or Authority. The respondent is a subject of that community and it is common cause that the grazing farm was allocated to the respondent by the Ondonga Traditional Community. It also appears to be undisputed that the grazing farm falls within the Ohangwena Region under the jurisdiction of the appellant.

[25] For the purposes of this judgment I will accept that Ekoka and Amupanda are separate locations to Odjele Grazing Farm and I will also accept that respondent erected the fence around that farm between 1986 and 1989. In his founding affidavit respondent states that he relied on the provisions of ss 18(b) and

28(2)(b) and 3 of the Act and therefore the removal of his fence was unlawful, null and void and is *ultra vires* the functions of the respondent. He further states that during 2005/2006 he applied to the relevant board (Oshikoto Communal Land Board) as contemplated by ss 18 and 28 of the Act for the retention of his fence. He further stated that he had not yet received any reply and his application was thus pending. He further points out that the period (then) determined by the Minister had not yet expired, therefore the removal of the fence was unlawful and *ultra vires*. He further stated that the appellant's reliance on s 44(3) is misconceived given the provisions of ss 18 and 28 and that the fence he erected is not in contravention of the Act. Therefore the appellant did not act within the ambit of the Act and for that reason alone the appellant had to be interdicted and directed to restore the fence to its original state.

[26] One of the basic purposes of the Act is to provide for the allocation of rights in respect of communal land. According to s 3, the functions of Boards are:

- '(a) to exercise control over the allocation and the cancellation of customary land rights by Chiefs or Traditional Authorities under the Act.
- (b) to consider and decide on applications for a right of leasehold under the 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 the Act.
- (d) to advise the Minister, in connection with the making of regulations or any other matter pertaining to the objectives of the Act.

(e) to perform such other functions as are assigned to a board by the Act.'

[27] Hence, notwithstanding the provisions of ss 28 and 35, s 37 empowers an investigating committee of a board, if the board has not yet determined an application in respect of land occupied, used or otherwise controlled by a person and enclosed with a fence, to conduct a preliminary investigation to establish the circumstances concerning (a) the occupation, use or control of the land by that person, (b) the existence of the fence on the land, and (c) any other matter which the board may investigate.

[28] Section 24 empowers a board to ratify an allocation of customary land right that may be made by a Chief or a Traditional Authority. If the allocation by a Chief or Traditional Authority is not ratified by the relevant board, such allocation has no legal effect.

[29] It is common cause that the grazing farm is situated in Ohangwena Region and therefor falls under the jurisdiction of the appellant. Ohangwena Region, like all regions in Namibia, is delineated in accordance with Art 102 of the Namibian Constitution. Sub-Article 2 of Art 102 provides that, 'the delineation of the boundaries of the regions and Local Authorities . . . hereof shall be geographical only without any reference to the race, colour or ethnic origin of the inhabitants of such areas.'

[30] Save for the exemptions which were prescribed by the Minister as per para [16] above, s 18 prohibits the erection of fences on land in a communal land area. The perimeter fence around the grazing farm does not fall within the exemptions provided by Regulations 26 and 27 (3) of Government Notice 37 of 1 March 2003. However, s 28(1) protects any existing customary land right held by a person in respect of the occupation or use of communal land, being a right of a nature referred to in s 21, and which was granted to or acquired by such person in terms of any law or otherwise.³ The holder of such a customary land right at the commencement of the Act shall continue to hold that right unless the relevant communal land board refuses recognition and registration of such right in terms of s 28 (2) or the land reverts to the state as contemplated in s 28 (13).

[31] Section 28(2) provides that from a date to be publicly notified by the Minister, every person who claims to hold a right in respect of the occupation or use of communal land shall be required to apply to the relevant board for the recognition and registration of such right and where applicable for authorisation for the retention of any fence existing on the land, if the applicant wishes to retain such fence or fences. Subsection (3) provides that, subject to s 37 (which provides for preliminary investigation of claim to existing rights), an application contemplated in subsection (2) must be made within a period of three years of the date notified under ss (2) but the Minister may by public notice extend that period by such period or periods as the Minister may determine. It is common cause that the date referred to in ss 2 for the lodging of applications as contemplated in ss 2

³ Section 21 provides for three forms of customary land rights that may be allocated in respect of communal land, namely, (a) a right to a farming unit; (b) a right to a residential unit; (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the Gazette for the purposes of the Act.

has been extended from time to time. In fact, by Government Notice No 19 of 28 February 2014, the Minister extended the period until further notice. It is thus argued that the time for making such applications had not yet elapsed when respondent's fence was dismantled and removed. To this argument, the court below had said the following:

'Having established that he had erected the perimeter fence prior to the coming into force of the Act and his intention to apply for authorisation for the retention of the perimeter fence – which he may still do until the end of February 2014 – it would follow that the removal of that fence which occurred at the instance of the respondent, was in my view unlawful and in clear conflict with the Act.'

[32] There can be no doubt that there is a tension in the Act between the provisions of s 28, which protects pre-existing fences in communal areas, and s 18 which, subject to such exemptions as may be prescribed, prohibits or makes it unlawful to retain any fence on communal land after the Act comes into operation unless permission has been granted for the retention of the fence. In fact, s 28(1) recognises rights in respect of the occupation or use of communal land granted or acquired prior to the Act coming into force 'in terms of any law or otherwise.' The court below understood the word 'otherwise' to denote a right acquired in another way, such as in terms of custom or customary law. I agree. In fact, one of the considerations by a board in granting authorisation for the retention of the fence is that the board must be satisfied that the fence or fences were erected in accordance with customary law or the provisions of any statutory law.⁴ My difficulty though is how to reconcile the somewhat contradictory provisions of ss 18 and 28. The High Court held that the prohibition in s 18 is suspended during the period in

⁴ See section 28 (8)(a) of the Act.

which application may be made for authorisation in terms of 28(2), a period which has now been extended indefinitely. In my view, when an application for the retention of the fence is pending in terms of s 28(2) before the relevant board, the prohibition in s 18 is suspended in relation to the applicant and will have no operation in respect of a fence, if an application for retention is granted. Should, however, an application be refused, s 18 will take effect and the retention of the fence after such refusal, will constitute an offence in terms of s 44(1)(b). The difficult question is whether the operation of s 18 is suspended in the period when an application for retention of a fence in terms of s 28(2) has not been made, although such an application may still be made because the time for the making of such applications has not yet elapsed.

[33] In my view, s 18 is not suspended under such circumstances. In fact, it remains operative whenever there is no application pending before the relevant board. To hold otherwise would be absurd. Take for example, that the period has been extended *sine die*, can it be said that the prohibition in s 18 is also suspended indefinitely or that the applications contemplated in s 28(2) are also suspended indefinitely. I do not think so. The Minister can only extend the period within which the applications may be made. The obligation to apply in terms of ss 2 remains and the prohibition in s 18 persists for as long as there is no pending application before the relevant board. The word extension amongst other things is defined in the Concise Oxford English Dictionary, 11 ed, as an additional period of time given to someone to fulfil an obligation.

[34] By Government Notice No 46 published in GG No 3591 of 15 February 2006, the Minister made known or prohibited the retaining of a fence of any nature which existed upon the commencement of the Act on any portion of land situated within a communal land areas after 28 February 2006, unless authorisation for the erection or retention of any such fence has been granted in accordance with the provisions of the Act. In the same GG, the Minister made known that with effect from the date of publication of GN 45 of 2006 which was 15 February 2006, every person who claims to hold a right in respect of the occupation or use of communal land, which was granted to or acquired by such person in terms of any law or otherwise shall be required to apply in the prescribed form and manner to the relevant Communal Land Board, established under s 2 of the Act;

- (a) for the recognition and registration of such right
- (b) for authorisation for the retention of any fence or fences existing on the land, if the applicant wishes to retain such fence or fences.

The notice further provided that:

An application in terms of s 28(2) must be made within three years from 15 February 2006, which took the period of applications to February 2009. Thereafter extensions were granted to 2012, 2014 and indefinitely.

[35] A hollow claim or defence of unexpired period, in my opinion, begs the question why the obligation in ss (2) of s 28 to apply could not be fulfilled in the original period of making such an application and the subsequent extended

periods. The Act came into force on 1 March 2003. Government Notice No 46 of 2006 prohibited the retaining of a fence of any nature on any portion of land within a communal land area after 28 February 2006 unless authorisation for the erection or retention had been granted. That deadline was extended to February 2009 and then February 2012, February 2014 and then indefinitely. By the time the respondent (applicant then) launched the application during August 2013, which culminated in this appeal, a period of over 10 years had elapsed since the Act came into force. The original period for making applications in terms of s 28(2) was a three year period up to 28 February 2006. Then came three extensions from 1 March 2006 to 28 February 2014.

[36] The respondent's application in the High Court was launched in the final year of the third extension, to be exact a little bit over 6 months left to 28 February 2014. Surely the time that had elapsed since March 2006 begs the question why respondent had not applied during the past 10 years to the relevant board. Amongst the purposes of the Act, is to provide for the allocation of rights in respect of communal land and an application to acquire such a right is obligatory in terms of s 28(2) to avoid the prohibition of s 28. That is so irrespective of the period contemplated in s 28(3) having been extended indefinitely. The three other purposes of the Act is to establish Communal Land Boards, to provide for the powers of Chiefs and Traditional Authorities and Boards in relation to communal land and to make provision for incidental matters. Land Boards have powers to perform in terms of the Act, the extensions as determined by the Minister are just mere additional periods of time given to apply. In my opinion, failure to apply within

a given or extended periods requires some justification which is absent in this case.

[37] Section 28(3) limits the period within which the application may be made but that period may be extended as the Minister may determine. It is clear that at the time the fence was removed, the respondent did not have a pending application before the relevant board (Ohangwena Communal Land Board). In the founding affidavit, the respondent stated that he had applied to the Oshikoto Communal Land Board during 2005/2006 for the retention of his fence in terms of s 28(2), as the appellant did not exist at the time and that the Oshikoto Communal Land Board was the relevant board at the time. This assertion is mistaken as the appellant, like all other boards, was established by Government Notice 203 of 15 September 2003 and came into existence with effect from 1 March 2003. Moreover, on 11 October 2004, the appellant through its chairperson addressed a letter to the respondent headed: 'Re: Illegal Occupation of Land at Ekoka in Ohangwena Region' asking him to desist from occupying the land in question without the appellant's prior approval. In the same letter the appellant reminded the respondent that it had not received any application form for the allocation of the customary land right and the respondent's attention was drawn to the provisions of ss 19-25 of the Act. This same letter was copied to the Ondonga and Oukwayama Traditional Authorities and the Deputy Director of the North West Region. The respondent did not respond to the said letter but the Ondonga Traditional Authority replied on 18 October 2004 under the signature of the Chief. The letter stated that Ekoka is under the Ondonga Traditional Authority and the Traditional Authority had the right to place anyone at Ekoka and that the

respondent had been placed at Ekoka at the pleasure of the Chief. The appellant replied on 20 October 2004 explaining to the Traditional Authority the procedure that should be followed when land is occupied and it referred to the relevant provisions of the Act. The appellant reiterated the point that it had not yet received any application form for the allocation of customary land right from the respondent.

[38] It was argued with reference to the court below's finding that the deadline for making the application contemplated in s 28(2) had not yet arrived when the respondent's fence was dismantled. Indeed at the time the respondent launched the application interdicting the appellant from dismantling his fence, the time period for making applications contemplated in s 28(2) was extended to February 2014. In my opinion this argument fails to appreciate the history of the dispute between the appellant and the respondent and the provisions of s 37. As I have already stated, the dispute between the parties came way back as 2004. One of the many investigation reports on illegal fencing by a Committee of the appellant is recorded in annexure 'DH5' as follows:

The report of Investigations of Illegal Fencing at Okongo Constituency

1. **On 27/9/2010** After all present the representative from NAMPOL and members of the Land Board of Ohangwena Region. The Chairman has explained the meeting that the work book of the Land Board has to be followed on all steps when investigating the illegal fencing to block those people who may be want to issue the Gov. in this matter.
 - 1.1 The meeting decided to write letters to Tileinge Wapulile & Shihaleni Ndjaba to appear in the meeting on 12th October 2010. The letters were also forwarded to Headman Amon Shipena and Mr. Brakias Haimbodi

as cc. They were also informed to bring along the documents of ownership and also to comply with section 24 of Act no 5 of 2002.

Please find the attendance list register **on appendix no 1. A**

Mr. Tileinge Wapulile and Shihaleni Ndjaba has appeared in the meeting on 12/10/2010, whereby Mr. Ndjaba informed the meeting that he has no land and he use the land that belong to Wapulile and he further said that he erected the fence according to the instruction given by Wapulile. **See appendix no 1. B for those who attended the meeting of the 12 October 2010.**

- 1.2 Mr. Wapulile explained to the meeting that he is the owner of the land that was fenced off by Mr. Ndjaba and himself which he divided into many sections with the gates that are always closed. Mr. Tilenge also indicated that he got that land in 1995 and he handed in the document that was issued to him by the Ondonga Traditional Authority. The meeting directed Ndjaba and Wapulile to open all gates to the water point so that the community can have access to water points and this has to be done within 30 days. And they had agreed to do so.'

[39] On his own version, respondent states that during September/October 2012 he attended a meeting on the invitation of the appellant. At that meeting, as already stated, he was served with a document titled 'notification order to remove the fence'. He further states that the notification order signed by the chairperson of the appellant, Mr Daniel Hangula, para 1 thereof, which states that the appellant conducted an investigation and determined that the fence located at Odyele Village, Okongo constituency in Ohangwena Region covering an area of 4354.8 hectares has not been authorised in terms of the Act. He further states that that paragraph is incorrect as he had the necessary authority and he had applied for exemption as provided for in the Act. Even when he had received this notification

he never bothered to apply to the relevant board. At the time respondent brought the application to interdict the removal of his fence, he still insisted he had applied when in the previous correspondences between the appellant and respondent, the appellant and the Ondonga Traditional Authority, the appellant indicated that it had not received an application for the retention of the fence from the respondent. He states that after he received the notification he contacted his legal representative and the Ondonga Traditional Authority who undertook to assist him. He accepted that his position was secure which was also buttressed by the fact that the appellant did not act on its threat to dismantle the fences after the 30 days had expired or he thought the threat had been abandoned. He further states that the Chief invited the Minister to the Palace and requested him to halt the removal of the fences until the border dispute case pending in the High Court between the Oukwanyama and Ondonga Traditional Authorities was finalized.

[40] On 22 August 2008, after further investigations of land occupation and fencing, the secretary to the appellant addressed a letter to the Ondonga Traditional Authority and the subject matter of the letter was 'Illegal Fencing at Omupanda Village – Okongo Constituency'. The letter informed the Traditional Authority of the illegal fencing at Omupanda village by the respondent and the appellant sought intervention of the Traditional Authority. In the said letter the appellant reiterated the provisions of s 18 of the Act.

[41] The Ondonga Traditional Authority replied on 17 October 2008 and also produced an investigation report. It is necessary to refer to the letter and report in full:

'ONDONGA TRADITIONAL AUTHORITY**P.O. Box 70, Ondangwa, Tel: 065 – 245832 / 240601 Fax: 065 – 245832**

Ref : 99/08
Enquiries : J.S. Asino

Mr. L. Kahaka
Ohangwena Land Board Secretary
Private Bag 88009
EENHANA

17 October 2008

Re: INTERVENTION ON ILLEGAL FENCING AT ONDJELE

1. Your letter dated 22 August 2008 has reference.
2. Upon request for our Authority intervention, we wish to inform your good office that a committee consisted of four people was sent to the site to do the investigation.
3. Having listened to the report, the council expressed satisfaction and endorses the findings that "Nothing is done illegally". Mr. Hapulile Tileinge is dividing his farm into smaller units to secure future grazing.
4. Finally, I would like to assure your good office that we did our part as per request and wish you further cooperation after we have closed this case.

Thank you

Signed _____

Joseph Simaneka Asino

Secretary for Ondonga Traditional Authority

cc. 1. King Immanuel Kauluma Elifas

2. P.S. Kauluma

**INVESTIGATION REPORT
OLAPOTA YOKUKONAKONA
(ondhaeate yaali paveta)**

1. Date : 16 October 2008

2. Place : Odjele

3. Delegation/Committee

3.1 Mr. P.S. Kauluma

3.2 Mr. F.J.Arnutenya

3.3 Mr. K.Augustus Indongo

3.4 Mr.Haihonya (apology)

4. Purpose (Elalakano)

4.1 To investigate a new fence being erected at Odjele farm as per complaint given by Ohangwena Land Board, in their letter dated 22 August 2008.

5. Findings (shono twa mono ko)

5.1 The fence is erected inside to divide the farm into blocks or units.

5.2 There is no need to give permission, if a person is just dividing his farm inside, into smaller units.

6. Action taken (Oshike sha ningwa po)

6.1 Investigation was done about the fence.

6.2 Nothing could be done, because it was not a new fence. The owner (Mr.Hapulile lileinge) is just dividing his farm inside, to secure good grazing.

7. Recommendations:

7.1 Mr.Tileinge Hapulile should go ahead, dividing his farm in order to prevent overgrazing.

7.2 This is a normal practice for any farmer.

Signed
Group-leader

20/10/08
Date

Signed
Secretary

20/10/08
Date

Map is hereon attached'

[42] It must be remembered that the Ondonga Traditional Authority, which from the record appears to have supported the respondent in his dispute with the appellant, did its own investigation of the subject matter in dispute and concluded that it was internal fences the respondent had fixed or just repaired the existing fence. Contrary to the provisions of the Act, the Traditional Authority considered the fence dispute closed. In its letter and report above, the Traditional Authority urged the respondent to continue maintaining his fence. As I have already stated, up to the time respondent launched the application against the appellant, his case was that he had applied. As such he cannot rely on the extension made by the Minister. The appellant had more than once reminded the respondent and the Ondonga Traditional Authority that it had not received an application from the respondent for the customary land right. When for reasons known by the respondent he did not direct his application to the relevant board, the provisions of s 18 operated against him and the appellant was empowered to act as it did, especially that it had granted the respondent notification to dismantle the fence himself failing which the appellant would do so itself. At the meeting of 12 October 2012 which the respondent had attended, he was requested to leave the gates of his fence open to allow the other members of the community access to the grazing and water points. He agreed to do so but he never opened the gates. In his founding affidavit he states, 'the opening up of any land to all and sundry will jeopardize my grazing as these other persons will bring their cattle onto my farm for grazing.' In as much as s 28 protected the respondent's fence, he was obliged

to comply with the provision that required him to apply for the retention of the fence to the relevant board. Given the history of the dispute between the parties which includes the preliminary investigations of the respondent's fence, I cannot fault the appellant for its conduct and given that the respondent clearly must have known that the appellant had jurisdiction and not the Oshikoto Land Board since at least 2012, his failure to lodge an application in terms of s 28(2) with the Ohangwena Land Board suggests that he did not intend to apply to that board. To have put the provisions of s 18 at bay, the respondent had to apply to the relevant board and when he failed to do so despite reminders to that effect, the prohibition in s 18 continued to operate against him, notwithstanding the fact that he had intention to still apply as the time for the making of such applications had not yet elapsed. In fact, the argument that the extended period had not yet elapsed does not arise in this case as respondent's case is that he had applied. Whether he had applied or not and notwithstanding the fact that the period for applications contemplated in s 28(2) had not expired, without an application pending before the relevant board, the prohibition in s 18 continued to operate against the respondent, the appellant was entitled to act as it did and the application should have been refused.

[43] Given the conclusion I arrive at on this one issue, I do not find it necessary to traverse all the issues raised in this appeal for and against the parties.

[44] The locality of Odjele is within the jurisdiction of the Ohangwena Communal Land Board. For the retention of his fence, he had to apply to that board. In actual fact, we have been informed from the Bar at the hearing of this

case that respondent has eventually applied to that board in terms of the mandate of s 28 of the Act. Given the fact that the respondent has now directed his application to the relevant board, at the dictates of s 28, it will be in the discretion of the appellant to consider the application of the respondent and re-allocate the customary rights afresh to the respondent in accordance with the tenets of the Act or retain the land and the fences to the use of the community in that area or the appellant should consider the respondent's application in the manner best suitable to the community in that area.

[45] As to costs, there is no justifiable reason why the costs should not follow the cause. I am also of the view that the complexity of the matter justifies the employment of two instructed counsel.

[46] I therefore propose the following order:

1. The appeal succeeds with costs.
2. The order of the High Court is set aside and it substituted for the following order: "The rule nisi is discharged with costs".
3. The respondent is to pay the appellant's costs in the High Court and the costs of this appeal, which costs shall include the costs of one instructing counsel and two instructed counsel.

SHIVUTE CJ

O'REGAN AJA

APPEARANCES:

Appellant:

G Budlender (with him D Khama)

Instructed by the Government Attorney

Respondent:

T J Frank (with S Akweenda)

Instructed by Sisa Namandje & Co Inc.