



**REPORTABLE**

CASE NO: SA 15/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**AGNES KAHIMBI KASHELA**

**Appellant**

and

**KATIMA MULILO TOWN COUNCIL**

**First Respondent**

**CHARLES NAWA**

**Second Respondent**

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**Third Respondent**

**CAPRIVI CABINS**

**Fourth Respondent**

**MR NDIMI**

**Fifth Respondent**

**PAULO COIMBRA**

**Sixth Respondent**

**MR KOEGENBERG**

**Seven Respondent**

**JL TALJAARD N.O.**

**Eighth Respondent**

**Coram:** DAMASEB DCJ, CHOMBA AJA and MOKGORO AJA

**Heard:** 2 October 2018

**Delivered:** 16 November 2018

**Summary:**

The appellant's late father was allocated a piece of land in 1985 in the then Caprivi Region (now the Zambezi Region) by the Mafwe Traditional Authority (MTA) on communal land. Following independence on 21 March 1990, all communal lands in Namibia became the property of the State of Namibia by virtue of Art 124 read with Schedule 5(1) of the Namibian Constitution but, in terms of Schedule 5(3) of the Constitution, subject to, amongst other, the 'rights', 'obligations' and 'trusts' existing on or over that land.

Appellant's father was still alive at the time of independence and continued to live without interference on the land (the land in dispute) allocated to him by the MTA with his family, including the appellant.

In 1995, the Government of Namibia which by certificate of State title owned the communal land of which the land in dispute was part, transferred a surveyed portion of it to the newly created Katima Mulilo Town Council (KTC) in terms of the Local Authorities Act 23 of 1992 (LAA). The appellant's father was still alive then and continued to live on the land as aforesaid. He died in 2001 with the appellant as only surviving heir who continued to live on the land - according to her as 'heir' to the land in terms of Mafwe customary law.

Whilst the appellant was living on the land in dispute, KTC as new registered title holder of the land rented out certain portions of it to fourth to eighth respondents, and subsequently offered to sell those rented portions to fourth to eight respondents in varying amounts.

The appellant issued summons in the High Court (Main Division) claiming that KTC was unjustly enriched (to her prejudice) by unlawfully renting out the land in dispute. She also claimed that, by offering to sell the land, KTC unlawfully 'expropriated' her land 'without just compensation' 'at market value'. The appellant relied for those allegations on Art 16(1) of the Constitution which guarantees property rights and Art 16(2) which provides that property may only be expropriated upon payment of just compensation. She also relied on s 16(2) of the Communal Land Reform Act 5 of 2002

(CLRA) which states that land may not be removed from a communal land area without just compensation to the persons affected.

The appellant therefore claimed as damages the rental amounts received by KTC as claim one and under claim two the amount for which the lands were offered for sale as being reasonable compensation for the 'expropriation'.

KTC pleaded that the appellant was not entitled to the relief sought because at independence and also upon transfer of the land to KTC the land in dispute ceased to be communal land and the appellant could not claim any communal land tenure right in that land. KTC, having become the absolute owner of the land could deal with it as owner without any encumbrance thereon.

The High Court agreed with KTC and dismissed the appellant's claim with costs, holding in the main that in terms of s 15(2) of the CLRA the land in dispute ceased to be communal land and that no communal land right claimed by the appellant could exist therein. The court *a quo* also *held* that if the appellant had any right to compensation it would be enforceable only against the Government of Namibia and not KTC and that, in any event, such a claim was prescribed.

On appeal, *held* that the issue of compensation was not put forward by the parties in their stated case to the court and therefore should not have been decided. Also, *held* that since prescription was not pleaded by the respondents it could not have been invoked against the appellant.

*Held* further that Schedule 5(3) of the Constitution creates a *sui generis* right in favour of the appellant and those similarly situated over communal lands succeeded to by the Government of Namibia and such right continued to exist even when transferred to a local authority such as KTC.

In rejecting the respondents' argument to the contrary, *held* that such right did not need to be registered in terms of s 16 of the Deeds Registries Act 47 of 1937 to be enforceable.

Also, *held* that a right created by Schedule 5(3) of the Constitution did not necessarily have to be vindicated in terms of Art 16(2) of the Constitution because the framers of the Constitution must have intended a remedy to be fashioned by the courts to give effect to the right created by the schedule. In other words, where there is a right, there must be a remedy.

Appeal allowed with costs in favour of the appellant and matter remitted to the High Court for the adjudication of the appellant's claim of unjust enrichment and compensation.

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### APPEAL JUDGMENT

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DAMASEB DCJ (CHOMBA AJA and MOKGORO AJA concurring):

[1] The present appeal raises the question: What right(s) does an occupier of communal land<sup>1</sup> have when the land which she occupies under customary land tenure is transferred by the Government of Namibia to a local authority<sup>2</sup>?

[2] The appeal is against the whole of a judgment and order of the High Court holding that the appellant (Ms Kashela) had failed to make out the case that she had any enforceable right against the first respondent, Katima Mulilo Town Council (KTC)<sup>3</sup>, which had on 2 October 1995, as successor-in-title, become the owner of a portion of communal land (the land in dispute) of the Mafwe ethnic group of Namibia. KTC was granted title to the land (without payment) by the Government of Namibia which had

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<sup>1</sup> The concept defies precise definition but is generally understood in Namibia to include land owned in trust by the government but administered by traditional authorities who make allocation of parcels of land to members of the community, ordinarily but not exclusively to live thereon, till and or graze thereon and generally to make a living, without acquiring title to the land.

<sup>2</sup> Which is either a municipality, town council or village council established in terms of Part 1 of the Local Authorities Act 23 of 1992 (LAA).

<sup>3</sup> A local authority established by the Minister of Local Government in terms of Part 1 of the LAA.

itself succeeded to the land at Independence<sup>4</sup> by virtue of Art 124 read with Schedule 5 (Schedule 5) of the Namibian Constitution (the Constitution).

[3] Article 124 of the Constitution states that:

‘The assets mentioned in Schedule 5 hereof shall vest in the Government of Namibia on the date of Independence’.

[4] Schedule 5 provides as follows:

‘(1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

(2) For the purpose of this Schedule, “property” shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.

(3) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

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<sup>4</sup> On 21 March 1990.

(4) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property.' (Emphasis supplied.)

[5] The land in dispute became State land on the strength of a Certificate of Registered State Title No. 4789/1991<sup>5</sup>. By virtue of an endorsement in that certificate<sup>6</sup>, that land was transferred to KTC on 2 October 1995. When all these transactions occurred, the late father of Ms Kashela, Mr Andrias Kashela, lived without interference on the land in dispute with his family, which included Ms Kashela. The family continued to live on the land uninterrupted even after it was transferred to KTC. In fact, Mr Kashela died in 2001 whilst living on the land, and there is no suggestion in the record that his occupation and enjoyment of the land was at any stage questioned or interfered with whilst he was alive by the Government of Namibia or KTC. Ms Kashela continued to live on the land after her father died.

[6] The dispute which is the subject of the present appeal was ignited when KTC, as the new registered owner of the land in dispute, rented out portions of land occupied by Ms Kashela (and later offered for sale by KTC) to fourth to eighth respondents.<sup>7</sup>

[7] In her combined summons issued out of the High Court (Main Division) in 2012, Ms Kashela sought damages for unjust enrichment (as the first claim) against

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<sup>5</sup> Authorised by Sch. 5(4).

<sup>6</sup> Executed in terms of s 3(3) (b) of the Local Authorities Act 23 of 1992.

<sup>7</sup> These respondents were cited for the interest they might have in the matter but no relief was sought from them. They therefore did not oppose.

KTC for her imminent loss of occupation of the land in dispute as a result of it being rented out to the fourth to eight respondents. In her second claim Ms Kashela claimed that KTC was liable to compensate her for alienating the land she acquired, to fourth to eight respondents in the sums that the land was offered for sale to those respondents; on the ground that it constituted unlawful expropriation of her right in the land without just compensation, contrary to Art. 16(2) of the Constitution, and s 16(2) of the Communal Land Reform Act 5 of 2002 (CLRA).

[8] Since Ms Kashela relies on Art. 16 of the Constitution and s 16 of the CLRA in support of her claim for damages for unjust enrichment, and compensation for the sale of the land, it is necessary to set out those provisions. Article 16 of the Constitution is the property clause. It provides as follows:

‘16 (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and moveable property individually or in association with others and to bequeath their property to their heirs or legatees: Provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.’

[9] Section 16(1) of the CLRA authorises the President of Namibia to, with the approval of Parliament, by proclamation ‘withdraw from any communal land area, subject to . . . subsection (2) any defined portion [of communal land] which is required for any purpose in the public interest, and in such proclamation make appropriate

amendments to Schedule 1 [which defines the boundaries of communal land areas] so as to. . . redefine any communal land area affected by [the withdrawal of land from a communal area]<sup>8</sup>.

[10] Section 16(2) of the CLRA states that land may not be removed from a communal land area ‘unless all rights held by persons’ under that Act in respect of such land or any portion of it ‘have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned’. According to subsec (4) of s 16 of the CLRA, any portion of a communal land area withdrawn from a communal area ‘ceases to be communal land and becomes available for disposal as State-owned land’.

### The pleadings

#### *Ms Kashela’s particulars of claim*

[11] Ms Kashela made the following allegations in her particulars of claim concerning the land in dispute. According to her, the land was part of land ‘designated as communal land’ in respect of which the ‘Mafwe was vested with legal powers to make customary land right allocations according to custom and law’. She also alleged that in 1985 her late father ‘was allocated a customary land right’ by a representative of the MTA who had the authority and competence to do so. It was when her father died in 2001 that she acquired the customary land tenure right in the land in dispute which ‘by virtue of customary law and by statutory powers vested in the Mafwe Traditional Authority’. She further alleged that the land in dispute was at ‘all material times . . . regarded and is designated as communal land and the Mafwe was vested

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<sup>8</sup> CLRA, s 16(c).



with legal powers to make customary land right allocations according to custom and law’.

[12] Ms Kashela alleged that KTC ‘has unlawfully taken portions of [her] land and unlawfully rented these portions’ to the fourth to eighth respondents. Therefore, KTC has been unlawfully enriched at her expense by receiving the rental payments to which she is entitled. Ms Kashela alleged that payment of rental to KTC was made without any lawful ground justifying the enrichment. According to Ms Kashela, KTC was enriched by receiving the rental payments in respect of land over which she exercises ‘exclusive customary law rights’.

[13] In respect of the first claim, Ms Kashela alleged that for renting out the portions of land, KTC received N\$20 000 per month for ‘at least three years’ from each of the fourth to eight respondents totalling to the amount of N\$720 000 which represents her damages for the unjust enrichment.

[14] The second claim arises in this way. According to Ms Kashela, in 2011 KTC offered for sale the respective portions of land to the fourth to eighth respondents who were unlawfully occupying it as tenants ‘pursuant to an illegal agreement’ – land over which she enjoys ‘exclusive customary rights’. The total of the sums for which the land was offered for sale to the fourth to eighth respondents is N\$2 415 000. According to Ms Kashela, the amount is reasonable and constitutes just compensation ‘for the loss of her exclusive customary rights’ in the land and her ‘access to the river frontage’. Ms Kashela anchors the right to compensation on s 16(2) of the CLRA read with Art 16(1)

and (2) of the Constitution. As for the latter, the implication is that the right she relies on is 'property' within the meaning of Art. 16(1).

[15] Ms Kashela's case thus rests on three foundations. The first asserts the existence of a right to occupy the land in dispute, while the second predicates that the right was unlawfully interfered with by KTC. The third foundation is that KTC's interference with her right amounts to expropriation, which attracts compensation either under Art 16(2) of the Constitution or s 16(2) of the CLRA.

*The opposing defendants' plea*

[16] The Government of Namibia was cited in the proceedings but chose not to participate in the litigation although this case raises an important constitutional issue. That is a matter for regret because the issues raised in the case have far wider ramifications than the litigants before court.

[17] The first and second respondents who opposed Ms Kashela's claim denied that the land in dispute was communal land over which the Mafwe had the powers alleged by Ms Kashela. The implication is that upon the land in dispute being proclaimed as town land of KTC, it ceased to be communal land and thereby extinguishing any communal land tenure rights that existed in it.

[18] The plea further states that KTC was therefore within its rights to lease and or sell the land in dispute and that it was not indebted to Ms Kashela in the amounts and on the grounds alleged in her particulars of claim. Curiously, the plea is silent on the allegations made in support of Ms Kashela's second claim which is predicated on the

right to compensation arising as a result of s16(2) of the CLRA and Art 16 of the Constitution.

[19] After the plea, the parties proceeded to file witness statements which are included in the appeal record. In a witness statement on behalf of the first respondent, its Chief Executive Officer, the second respondent, admitted liability by stating that Ms Kashela was offered compensation but that she wanted more than what she had been offered. He also stated that the first respondent had a policy to compensate persons similarly situated as Ms Kashela.

[20] Ordinarily, those admissions should have put the matter to bed and a judgment given in favour of Ms Kashela. But KTC is a creature of statute and it is important that the court is satisfied that it was authorised to admit such liability. A statutory body can only do (including assuming a liability) that which it is allowed by law.<sup>9</sup>

[21] The parties then filed a 'statement of agreed facts' on the basis of which they asked the court below to determine a point of law. Amongst others, the parties' statement of facts recorded that the late Mr Andrias Kashela - in respect of the land in dispute-'held exclusive use and occupation rights in terms of the customary laws of the Mafwe conferred on him during 1985 by the then Chief of the Mafwe, Chief Richard Muhinda Mamili'.

[22] The dispute the court was asked to resolve was framed as follows:

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<sup>9</sup> *Mbambus v Motor Vehicle Accident Fund* 2015 (3) NR 605 (SC) at 619, para 48.

‘The point of law that is to be determined by way of special case for adjudication is whether or not [Ms Kashela] holds valid customary law rights in relation to the land which is the subject of her claim. Therefore, the parties desire the issue of whether or not the Plaintiff validly acquired and still holds customary land rights over the land in question to be determined as a point of law.’

[23] That is the issue the High Court was asked to determine. In framing the issue as they did, the parties limited themselves to the issue they defined and they were and are bound thereby; and so was the court *a quo*. The court *a quo* should have heeded what Shivute CJ stated in *JT v AE*<sup>10</sup>:

‘[W]hen at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the court, as a general principle, the court cannot unilaterally alter the position without affording the parties an opportunity to make submissions on the proposed new tack in the course of the proceedings.’

[24] The dispute for resolution by the High Court was therefore limited to whether Ms Kashela acquired and still holds valid customary land tenure rights in the land in dispute. It becomes immediately apparent that the parties did not invite the court *a quo* to decide - in the event Ms Kashela had such rights:

- (a) whether or not she was impoverished (and KTC enriched) by renting out the land as it did under claim one, and
- (b) whether or not she was, in respect of claim two, entitled to compensation based on s 16(2) of the CLRA and Art 16 of the Constitution.

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<sup>10</sup> 2013 (1) NR 1 (SC) at 8A-B, para 19; *Namib Plains Farming and Tourism v Valencia Uranium* 2011 (2) NR 469 (SC) at 483C-D, para 38; *Stuurman v Mutual & Federal Insurance Co of Namibia Ltd* Case No: SA 18/2008 para 21 delivered on 17/03/2009.

### The High Court's approach

[25] According to the High Court, once land ceased to be communal land in terms of s 15(2) of the CLRA<sup>11</sup>, read with s 3 of the LAA, the effect was that the transferee local authority becomes the owner thereof and the land ceases to be communal land. The court *a quo* held that once the land ceased to be communal land and became town land, all customary land tenure rights subsisting in the land cease to exist. In support of that conclusion, the learned judge *a quo* relied on art. 100 of the Constitution which decrees that all land belongs to the State, unless it is otherwise lawfully owned.

[26] The High Court also found that Ms. Kashela's right to compensation, if any, for the loss of the land in terms of Art 16(2) lay against the State and not KTC but that, in any event, the claim was prescribed.

### The grounds of appeal

[27] Ms Kashela's main grounds of appeal are that the High Court misdirected itself in holding that:

- (a) the State's succession to communal land extinguished any rights held in such land by Ms Kashela or those similarly situated;
- (b) KTC took ownership of the land in dispute free from any obligation towards Ms Kashela and those similarly situated;

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<sup>11</sup> 'Which states: 'Where a local authority area is situated or established within the boundaries of any communal land area the land comprising such local authority area shall not form part of that communal land area and shall not be communal land'.

- (c) the State and KTC acquired the land absolutely and without any obligation to pay just compensation for expropriating the land from Ms. Kashela or anyone similarly situated;
- (d) Ms Kashela had no claim for unjust enrichment against KTC;
- (e) Ms Kashela's claim, if any, lay against the State and not KTC;
- (f) Ms Kashela's claim had prescribed; and
- (g) Ms Kashela must pay the opposing respondents' costs.

#### Submissions on appeal

##### *The Appellant*

[28] According to Mr Odendaal of the Legal Assistance Centre acting *pro bono* for Ms Kashela, a right to occupy and use land acquired under communal land tenure is a property right protected by Art 16(1) of the Constitution and may not be taken away without compensation at market value. That right is capable of being inherited by a child of a person in whom it vested and can be passed on in perpetuity, from one family member to another. According to counsel, the right is not extinguished by the Minister declaring it part of a local authority's land, and upon such declaration, becomes an obligation or liability subject to which the local authority acquires ownership of the land as contemplated by Schedule 5(3).

[29] Mr Odendaal submitted that a right of 'ownership' of communal land should be accorded the same protection under the Constitution<sup>12</sup> as rights of freehold are recognised under the Roman-Dutch common law. The argument goes that if it were otherwise, the black majority of Namibia's population, who had been dispossessed of their ancestral land through colonization, would have no rights to land under our law.

[30] According to Mr Odendaal, the transfer of communal land to the State in 1991, the declaration of KTC as a town council in 1995 and the death of Mr Andrias Kashela in 2001 did not extinguish Ms Kashela's customary law land tenure rights and that she was entitled to just compensation for the loss of that right.

[31] According to Mr Odendaal, Ms Kashela's right to occupy and use the land in dispute is a 'right' or an 'obligation' which attached to the land upon transfer to KTC. He countered that the liability to compensate had not arisen until the moment when KTC interfered with Ms Kashela's right by 'expropriating' the land 'in the public interest'.

[32] Mr Odendaal implored the court to adopt a purposive interpretation of Art 16 and Schedule 5(3) of the Constitution so as to give equal value to customary land tenure rights as other real proprietary rights under the Common Law, in order to promote equality under the law for the previously marginalised communities who, because of past discriminatory practices, were unable to own freehold title before Namibia's Independence.

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<sup>12</sup> Because of the right to equality guaranteed by Art 10 of the Constitution which states as follows: '(1) All persons shall be equal before the law. (2) No persons may be discriminated on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

*First and second respondents*

[33] Mr Narib appeared on behalf of the first and second respondents. According to counsel, when the land in dispute became town land, whatever customary rights of use and occupation which existed in it ceased to exist; and, *a fortiori*, could not have extended to Ms Kashela as a surviving heir of the late Mr Andrias Kashela.

[34] Mr Narib added that the land in dispute ceased to be communal land whilst Ms Kashela's father was alive. The recurrent theme in Mr Narib's submission is that the land in dispute lost the status of communal land when it became State land and in any event when it was transferred to KTC as town land.

[35] According to Mr Narib, Ms Kashela's right to occupy the land in dispute was a precarious personal right which, without registration in terms of s16 of the Deeds Registries Act 47 of 1937 (DRA)<sup>13</sup>, was not enforceable. Precarious because, as Mr Narib contended, communal land tenure rights could, under the pre-Independence legislative framework, be terminated at will either by the traditional authorities or the Colonial Administrator General, depending on who was vested with the power at the time.

[36] Mr Narib also argued that being a personal (precarious) right, the right of communal land tenure would in any event not be registrable because s 63 of the DRA

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<sup>13</sup> Section 16 provides that 'ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the [registrar of deeds], and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested to by a notary public and registered by the [registrar of deeds]'.



prohibits the registration of a personal right in respect of immovable property purporting to extend beyond the lifetime of the person in whose favour it was created.

[37] Mr Narib took the view that Schedule 5(3) is of no relevance because no right to compensation was lodged against the State when it took transfer of the land.

[38] According to counsel, the court *a quo* was correct in its conclusion that if Ms Kashela were entitled to any compensation it would not be against KTC but against the State which succeeded to the land in dispute at Independence.

#### The High Court's misdirection: compensation and prescription

[39] It will soon become apparent that the raft of the grounds of appeal and the parties' legal contentions fall by the way side when I set out below the misdirection by the court *a quo*.

[40] If regard is had to the parties' stated case, the issue of compensation was not a live issue before the court *a quo* and should therefore not have been decided. The parties deliberately chose to exclude it for determination at that stage of the proceedings, probably awaiting a decision on whether or not Ms Kashela had a valid customary land tenure right in the land in dispute and whether any liability attached to KTC arising from an interference with that right. Similarly, the court *a quo* erred when it found that Ms Kashela's claim for compensation was prescribed. The respondents had to specifically plead prescription by way of special plea but chose not to do so.<sup>14</sup>

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<sup>14</sup> Prescription Act 68 of 1969, s 17: *Walsh NO v Scholtz* 1968 (2) SA 222 (GW) and *Union & SWA Insurance Co Ltd v Hoosein* 1982 (2) SA 481 (W).

[41] It must follow that the sole question we should be concerned with in this appeal is whether or not Ms Kashela acquired and still holds a valid customary law tenure right in the land in dispute and whether any liability attaches to KTC arising from its interference with that right.

[42] The High Court made an important finding which resolves part of the issue which this court must decide. It concluded that upon the death of her father, Ms Kashela acquired a customary law tenure right to the land in dispute. As the court said:

[6] Mr. Andrias Kashela and his family occupied the land exclusively in terms of their customary law. In 2001, Mr. Andrias Kashela passed away and the plaintiff acquired those customary rights in accordance with the prevailing customary laws and norms of the Mafwe Traditional Community.

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[16] In Namibia certain areas of land are designated as communal land. Their distinguishing feature is that the ownership thereof vests in the State who (sic) according to the provisions of the Communal Land Reform Act, Act No. 5 of 2002 (sic). The statutory regime pre-dates the Independence of Namibia at a time when Namibia was still administered by the Republic of South Africa. Although the State is the owner of the land, it holds the land in trust on behalf of traditional communities and their members who live there.' (My underlining)

[43] The conclusion arrived at by the High Court has not been challenged by way of cross-appeal. It is therefore settled that Ms Kashela acquired and held a customary land tenure right in the land in dispute when the father died in 2001. The issue that remains then is whether that right survived the transfer of the land to KTC

as town land and imposed an obligation on it to compensate for any loss suffered by Ms Kashela as a result of an interference with the right. That issue requires a proper construction of Schedule 5 of the Constitution.

### Evolution of communal land

[44] In order to place the present dispute in proper context, it is necessary for us to understand the institution of communal land and both its legal (legislative) and socio-political implications. Towards that end, Mr Narib for the opposing respondents is correct in his submission that before Namibia's Independence, those who lived on communal land enjoyed only a precarious right in it. Those rights could, as counsel correctly and forcefully argued, be removed at the whim of the traditional leader or the Colonial Administrator.

[45] The then ever changing legislative landscape - much to the detriment and uncertainty of the communities that inhabited communal land pre-Independence - proves Mr Narib's point. I proceed to give a brief summary of that legislative background.<sup>15</sup>

### ***The legislative framework***

[46] The South West Africa Native Affairs Administration Act 56 of 1954 (Act 56 of 1954) vested all assets, rights, liabilities and obligations of any Fund established under any law for purposes of or in connection with communal land in the South African Development Trust. That Trust had therefore become owner of communal land.<sup>16</sup>

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<sup>15</sup> See S K Amoo, *Property Law in Namibia*, Pretoria University Law Press (2014) pp 16-19.

<sup>16</sup> See s 4.

[47] Act 56 of 1954 endowed the Governor-General the power to, by proclamation, rescind any reservation or to set apart any land or area for the sole use and occupation of indigenous Namibians, referred to in the Act as 'natives'.<sup>17</sup> That Act, however required the Governor-General in that event to set apart land of at least equivalent 'pastoral or agricultural value for the sole use and occupation' of the affected ethnic group.<sup>18</sup> The rescinded land then became un-alienated State property<sup>19</sup> in and over which, as Mr Narib submitted, no further rights of customary land tenure existed.

[48] The Development of Self-Government for Native Nations in SWA Act 54 of 1968 transformed the tracks of land set aside for the sole use and occupation of so-called natives, into 'homelands'. Then followed Proclamation AG 8 of 1980<sup>20</sup> which empowered the Administrator-General to create 'representative authorities' for the various ethnic groups.<sup>21</sup> The myriad proclamations dealing with the different indigenous communities (referred to as natives) introduced the concept of 'communal land' which then was placed under the jurisdiction of a representative authority.

[49] The Representative Authority for Caprivians (which included the Mafwe) was established by Proclamation 29 of 1980.<sup>22</sup> Section 33 of AG 29 of 1980 stipulated the circumstances under which land would cease to be communal land.

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<sup>17</sup> See s 5.

<sup>18</sup> Ibid.

<sup>19</sup> Section 5(2).

<sup>20</sup> Representative Authorities Proclamation, 1980.

<sup>21</sup> Section 3 of AG 8.

<sup>22</sup> Amongst its functions was to alienate, or grant or transfer occupation and possession of land, or any right to land which is communal land of the particular population group: AG 8, Item I of the Schedule.

[50] Proclamation AG 8 of 1989 repealed AG 8 of 1980 and all the powers then vesting in the representative authorities were vested in the Administrator-General who then exercised jurisdiction over communal land until the date of Independence.

[51] Enter the post-Independence CLRA which, in s 17 provides that:

‘(1) Subject to the provisions of this Act, all communal land areas vest 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.

(1) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.’

*Socio-political Context: Institutionalised Inequality in Namibia*

[52] At Independence on 21 March 1990, Namibian society’s wealth and income distribution was stratified on clear racial lines. The minority White population owned most of the country’s wealth and land, whilst the majority and indigenous Black population was at the lower end of the socio-economic spectrum, with only a small middle class. The country was carved up, on the one hand, into urban metropolises and surveyed farmland on which the whites lived and, conversely, a cluster of largely arid and undeveloped so-called ‘homelands’ for blacks.<sup>23</sup>

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<sup>23</sup> Werner helpfully chronicles how over a century successive colonial administrations (starting with the Germans in the 1800s) methodically and systematically dispossessed indigenous communities of their land and forced them onto arid or semi-desert lands which the authorities either created or redefined as ‘native reserves’ or ‘homelands’: Wolfgang Werner ‘A Brief History of Dispossession in Namibia’ (1993) *Journal of Southern African Studies*, Volume 19, No.1.

[53] The land reserved for whites boasted very modern infrastructure and clearly defined legal instruments that protected ownership of wealth – not least in and over land. Those who owned land and rights in that land, therefore, enjoyed a panoply of sophisticated system of laws which protected their rights in and over land. The DRA is one such example.

[54] The fear of loss of those rights is the backdrop against which the pre-Independence constitutional settlement was negotiated and took the form it did in, *inter alia*, Art 16 of the Constitution. That not only perpetuated the inequality inherited at Independence, but accentuated it.

[55] In contra-distinction to the system of laws that protected rights in and over land owned mainly by whites, in respect of the land on which the majority of the population lived, there was an absence of a coherent system of laws and rules that protected the rights of the people who lived on it. Hence the suggestion on behalf of KTC that land tenure rights in communal land were precarious. No doubt in the interest of an orderly transition, Schedule 5(1), read with Art 124 made communal lands property of the Namibian State.

[56] Such is the backdrop against which we must assess KTC's submission (which finds support in the High Court's judgment) that Ms Kashela and those similarly situated lost whatever rights they might have had in communal land upon that land becoming state land and, subsequently, municipal or town land.

Proper interpretation of schedule 5(3)

[57] Two discrete questions need resolution. Firstly, what obligations or liabilities did KTC assume when that land was declared KTC's town land and became its property? Secondly, assuming that the late Mr Andrias Kashela retained or acquired any rights over the land upon its proclamation as town land, did those rights survive his death and pass on to his heir? Answering those questions calls for a proper interpretation of Schedule 5.

[58] Mr Narib's submission as earlier on set out, carries two possible interpretations. The first starts by recognising that the right claimed by Ms Kashela is covered by Schedule 5(3) but that the right does not assume legal force unless and until it is registered in terms of s 16 of the DRA. The second is that only rights capable of registration in terms of s 16 of the DRA are protected by Schedule 5(3).

[59] I will deal with the second possible interpretation only briefly because it is predicated on a wrong premise. It suggests that provisions of the Constitution must be interpreted by reference to the contents of ordinary legislation. The converse is, of course, the correct position because as the supreme law, the Constitution enjoys primacy over all law subordinate and subject to it.<sup>24</sup>

[60] The second interpretation carries with it the implication that unless a right is registered under s 16 of the DRA, the Constitution does not recognise it for the purposes of Schedule 5(3). I do not agree. If it is possible to interpret and apply the Constitution in a way that achieves harmony between it and a statutory enactment, that is the course the court must adopt.

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<sup>24</sup> *MW v Ministry of Home Affairs* 2016 (3) NR (SC) 707, para 46.

[61] The course that Mr Narib proposes we follow is one which is not justified because it assumes a conflict between the scheme of the DRA and Schedule 5 (3). It is also a path which does not lead to justice for a significant segment of Namibian society which had no access to freehold land which, at Independence, could benefit from the protections afforded to those with the kind of rights envisaged by s 16 of the DRA.

[62] As for the first interpretations, I deal more fully with its implications below.

[63] I did not understand Mr Narib to question the proposition made by Mr Odendaal on behalf of Ms Kashela, that the representative authorities created by AG 8, or the Administrator General - both referenced in Schedule 5(1) - held the land in trust<sup>25</sup> for the respective tribal communities over whom they had jurisdiction. They were required to allocate land to members of the tribal communities for habitation and use. Those rights, although not real rights as understood at common law, entitled the holders to live on, work the land and sustain themselves from it.

[64] The central plank of Mr Narib's argument is that, in the first place, the rights enjoyed in and over communal land were, at best, precarious and could be changed or taken away at a whim under pre-Independence legislation, and therefore retained that character when it became State land at Independence. That, secondly, it is not the kind of right which, because of its precarious character survives either transfer

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<sup>25</sup> It is worth noting that Schedule 5(3) protects a 'trust' existing over the land succeeded to by the State at Independence.



from the State to a local authority, or the death of the person who originally acquired it.

[65] With the greatest respect, rather than it being a strength, this line of reasoning reveals a fundamental fault line in KTC's argument. It negates the imperative that the Constitution represents a fundamental break with the past and infuses a culture of rationality and fairness in the manner the State relates to and deals with the citizens over whom it holds sway. As Mahomed AJA observed in *S v van Wyk*<sup>26</sup>:

'Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread – an abiding "revulsion" of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people 'for so long' and a commitment to build a new nation 'to cherish and protect the gains of our long struggle' against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity. (See the Preamble of the Constitution and Arts 10 and 23.)

That ethos must 'preside and permeate the processes of judicial interpretation and discretion . . . '

[66] I earlier demonstrated how unjustly the black people of Namibia were treated by successive colonial administrations in the realm of ownership and access to land. They hardly enjoyed any meaningful rights in land, and whatever insignificant rights they did enjoy could be taken away at whim as poignantly pointed out by Mr Narib on behalf of KTC.

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<sup>26</sup> 1993 NR 426 (SC) at 456G-H.

[67] Against that backdrop, it is counter-intuitive to argue that because, pre-Independence, traditional communities only had precarious rights in land which they inhabited, that palpable injustice was retained by the Constitution – a Constitution which, as Mahomed AJA reminds us, was intended to free them at last from the cruel vestiges of the past; of insecurity and hopelessness. The injustice that those communities endured calls for a benevolent interpretation of Schedule 5(3) of the Constitution which restores their dignity and not to undermine it.

[68] It cannot be correct that the State's succession to communal land areas at Independence extinguished the communal land tenure rights that subsisted in that land such that the interference with them would not attract a remedy within the scheme created by para (3) of Schedule 5, regardless of whether or not it falls within the ambit of Art 16 (2).

[69] There was, perhaps, an undue emphasis on Art 16 of the Constitution by Mr Odendaal as regards the kind of remedy available to protect 'rights' and 'trust' contemplated by Schedule 5(3). Counsel adopted the approach that the right which Ms Kashela asserts can only be vindicated through Art 16 of the Constitution. There is no reason why, if Ms Kashela has a right under Schedule 5(3) which was violated, a remedy cannot be fashioned or tailored to give effect to Schedule 5(3).

[70] It could not have been the intention of the framers of the Constitution to grant a right which was unenforceable by the courts; for where there is a right, there must be a remedy to be fashioned by the court seized with the matter. The remedy will depend on how the matter is pleaded, the evidence adduced in support and generally the

circumstances of the case. Also to be placed in the scale is the extent of the interference, the dislocation and the improvement brought about on the land.

[71] As Centlivres CJ observed in *Minister of Interior & another v Harris & others*<sup>27</sup>:

‘There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforced by the Courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right.’

In support, Centlivres CJ cited with approval a dictum from England in the following terms:

‘that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of a right, in law, and having no right, are in effect the same’.<sup>28</sup>

[72] When the Government of Namibia took ownership of communal land areas as successor-in-title by virtue of Schedule 5(1), it assumed an ‘obligation’<sup>29</sup>, at a bare minimum, to look after the interests of the people who lived on it. It never stopped holding that land in trust for the affected communities. It bears mention that Schedule 5(3) refers to ‘rights’, ‘obligations’ and ‘trust’. In so doing it employs language aimed at recognising that in such land there are interests short of rights in the black-letter law sense. That is so because the legal framework that governed communal land prior to Independence treated it as trust land.

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<sup>27</sup> 1952 (4) SA 769 at 780H-81A-B.

<sup>28</sup> *Dixon v Harrison*, 124 E.R. 958 at p 964. See also to same effect Holt CJ’s *dictum* in *Ashley v White*, 92 E.R. 126 at p 136.

<sup>29</sup> Vide Schedule 5(3).

[73] The intent clearly is to impose an 'obligation' on the State to respect the interests held by the affected communities in communal land, for most of whom it was, and remains the only means of livelihood and survival.

[74] As successor-in-title to communal land areas, the Government of Namibia assumed the 'obligations'<sup>30</sup> which attached to the land. An obligation which involves recognition and respect for the rights of the members of the community to live on the land, work it and sustain themselves.

[75] The scheme of Schedule 5 is capable of a construction that the rights envisaged by Schedule 5(3) are not of the kind which require registration under the DRA to have the force of law. As we suggested to the parties during oral argument, in understanding rights, obligations and trust under para (3) of Schedule 5, it is important to bear in mind that the state is a unique creature as owner of land. In that context, it is not to be equated to a private owner of land whose motive is to pursue selfish interests.<sup>31</sup>

[76] The state, as owner of land, in the context of Schedule 5, has social 'obligations' which a private owner does not have. It has to use that land for the public good. I do not see what public good is served by a construction of Schedule 5 which has the effect of perpetuating injustices of the past which the Constitution has removed.

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<sup>30</sup> Vide Schedule 5(3).

<sup>31</sup> Badenhorst *et al*, *Silberberg & Schoeman's The Law of Property*, LexisNexis (2000, 5 ed) p 3.

[77] I do not agree with Mr Narib that the nature and content of the right required proof. The nature and content of a customary land tenure right is a matter either of general knowledge<sup>32</sup> amongst Namibians - most of whom originate from these communities - or of historical notoriety<sup>33</sup>. In any event, as I already demonstrated, the High Court recognised the existence and content of the right – a finding not challenged by way of cross-appeal. The High Court held that Ms Kashela acquired the exclusive customary law rights her late father held in the land in dispute upon his passing. As I have shown, the Constitution's scheme supports such a claim.

[78] The fact that land ceased to be communal land does not necessarily result in the occupier of that land losing the protection given by Schedule 5(3). That provision makes clear that the land is transferred to the Government 'subject to any existing right . . . obligation over the property'. It must follow that s 15(2) of the CLRA relied on by the court *a quo* to find against Ms Kashela finds no application because the right embedded in Schedule 5(3) is a *sui generis* right given under the Constitution (with a corresponding obligation on the successor to the land) and it must take primacy.

[79] Given the socio-political context in which the right arises, there is no reason in public policy why it should not extend to a local authority such as KTC as successor in title. It is an important public policy consideration that KTC is an organ of Government<sup>34</sup> which, after all, received the land in dispute for free, for a public purpose.

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<sup>32</sup> Zeffert and Paizes, *The South African law of Evidence*, LexisNexis (2009, 2 ed) at p 868.

<sup>33</sup> *Ibid*, p 875 and see my characterisation of the right at para [63] above.

<sup>34</sup> See Chapter 12 of the Constitution.

[80] When, at Independence, the State of Namibia became the lawful owner of the lands on which the majority of the black people live, immediately a tension arose: On the one hand the legitimate state interest to develop those areas through the establishment of infrastructure and planned development through the agency of local authorities, and availing land on which affected local communities would continue to live and provide for themselves. The notion that one was more important than the other is difficult to reconcile with the Namibian State's duty to look after the wellbeing of its marginalised communities and to restore their lost dignity.

[81] Conclusion

I come to the conclusion that Ms Kashela acquired a right of exclusive use and occupation of the land in dispute upon the passing of her father and that the right survived and attached to the land even after its proclamation as town land. That right is enforceable by the courts of law which must, in the case of breach, tailor a remedy to meet the circumstances of the facts.

[82] The High Court was not called upon to decide, and accordingly we refrain from deciding, whether Ms Kashela made out a case for unjust enrichment for claim one, and whether she was entitled to compensation in the amounts she claims under claim two. Those issues must be remitted to the High Court for further adjudication. It need not be heard by the same judge who adjudicated the stated case as that issue is factually distinct from the remainder of the issues to be determined.

[83] Ms Kashela has achieved substantial success and is entitled to her disbursements since she is represented by the Legal Assistance Centre, a public

interest Law Centre which provides legal services to the public without charge, both *a quo* and in the appeal.

### The order

[84] I therefore propose the following order:

1. The appeal succeeds and the judgment and order of the High Court is hereby set aside and replaced by the following:
  - '1. The question of law raised by the parties in the stated case is resolved in favour of the plaintiff.
  2. The parties are directed to meet within 10 days of this order and to generate a joint case management report on the future conduct of the case on the remaining issues. That report is to be submitted to the Deputy Judge President.
  3. Costs are awarded to the plaintiff against the first defendant, limited to disbursements.'
2. The appellant is awarded costs of the appeal against the first respondent, limited to disbursements.
3. The matter is remitted to the High Court for the Deputy Judge-President to designate a judge to preside over and finalise the matter.

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**DAMASEB DCJ**

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**CHOMBA AJA**

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**MOKGORO AJA**



## APPEARANCES

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FIRST AND SECOND RESPONDENTS:

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