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INFORMATION ABOUT NAMIBIA'S LAW

Illegal Fencing and the Law

“Illegal fencing” is when a person unlawfully encloses a piece of communal land in order to use the land for their exclusive benefit.

When illegal fencing takes place, the natural resources on the land often become inaccessible to others who depend on these resources for their survival. For instance, illegal fencing reduces livestock grazing and restricts the communal use of firewood and veld food. It also increases human-wildlife conflict by interfering with the movements of wildlife.

Illegal fencing is not new in Namibia. Soon after Independence, the Namibian Government recognised illegal fencing as a problem affecting the livelihoods of subsistence farmers. In his opening statement at the 1991 Land Conference, former State President Sam Nujoma stated that wealthy Namibians are responsible for illegally fencing-off communal lands. Participants at the 1991 Conference reached consensus that illegal fencing of communal areas should be stopped and all illegal fences removed.

However, illegal fencing has continued unabated, despite the passing of the Communal Land Reform Act 5 of 2002 that regulates (amongst other things) the erection of fences on communal land.

The Communal Land Reform Act, which came into operation on 1 March 2003, takes a strong position against illegal fences. For example, section 18 of the Act states that no new fences may be erected without proper authorization obtained in terms of the Act. Similarly, fences that were already in place when the Act came into operation have to be removed, unless the persons who erected them apply for and receive permission to retain them from the Communal Land Board. This means that, from 1 March 2003 onwards, specific authorisation under the Act was necessary for the erection of new fences or the retention of existing ones.

There are some exceptions to the general rules on fences in the regulations issued under the Act. For example, no applications are needed to retain fences around homesteads, cattle pens, water troughs or crop fields.

Section 28 of the Act provides that people who want to retain existing fences which do not fall under the exceptions must apply to their regional communal land board for authorization. In considering such an application, one important factor is whether the fence was erected in accordance with customary law. The fence should also not unreasonably limit or interfere with the use and enjoyment of the commonage by members of the traditional community. If reasonable grounds exist for the retention of a fence, the board will grant an authorisation to the applicant to keep the fence in place - but it may impose conditions at the

same time. The Act is silent on what constitutes reasonable grounds for the retention of a fence in a communal area.

Section 44(1) of the Act stipulates that it is a crime to erect a new fence or to retain an existing fence beyond a period of 30 days after an application for permission to keep that fence in place has been refused. The penalties for these offences are a maximum fine of N\$4,000 or one year's imprisonment, or both.

If a person still refuses to take down a fence even after being convicted under one of these offences, he or she can be fined up to N\$50 for each day that the fence remains standing. In addition, the costs of removing the fence can be recovered from the person who contravened section 44(1).

Section 44(3) provides that a Chief or Traditional Authority, or the relevant communal land board, may cause an illegal fence to be removed and recover the costs of the removal from the person who erected or retained the fence.

It is evident that the Communal Land Reform Act provides strong rules regulating fences on communal land, to protect the livelihoods of the majority of Namibians living in Namibia's communal areas. However, the Act on its own will not lead to the removal of illegal fences. Despite the existence of the law, regions such as Omusati, Ohangwena, Oshikoto, Kavango, Otjozondjupa and Omaheke have increasingly been affected by illegal fencing over the years.

At the Second Land Conference in 2018, illegal fencing was again put on the agenda as a pressing problem that affects the poor and marginalised, with participants lamenting the fact that law enforcement has had a limited impact on illegal fences. In a statement made by President Geingob after the Conference, he remarked that "a Government that cannot enforce laws or observe the rule of law is not sustainable". He recommended that all illegal fences should be identified, and that those responsible for illegal fences should be given notice to remove them within a reasonable timeframe.

In order to make law enforcement effective, it is important for land boards and traditional authorities to work together in identifying problem areas. In addition, the Ministry of Safety and Security should play a stronger role in enforcing laws prohibiting illegal fencing in communal areas. Finally, a national sensitisation and consultation process is needed to support law enforcement agencies to enforce the law without fear or favour.

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