

## Communal Lands Appeal Tribunal – Judicial Or Investigative?

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**THE COMMUNAL Land Reform Act mainly deals with the management and administration of communal land in Namibia.**

The major role players as defined in the act include the traditional authorities, communal land boards, and communal land appeal tribunals.

When there are appeals against the decisions of the traditional authorities or land board by aggrieved parties, the appeal tribunals are empowered to hear such appeals and pass judgements. According to section 39 (6), the decision of the appeal tribunal is conclusive and legally binding on the parties. Any party aggrieved by the decision of the appeals tribunal has the right to appeal to the High Court.

The main focus of this opinion piece is on the roles of the communal land appeal tribunals. There is no consensus on the question of whether appeal tribunals are empowered by the Communal Land Reform Act to conduct face-to-face hearings/investigations. The Ministry of Land Reform and communal land boards appear to encourage the notion that the appeal tribunals should be conducting investigations. Communal land appeal tribunals' members share different views on this issue. Some appeal tribunal members are in favour of conducting investigations, while others are not.

A feasible argument against appeal tribunals investigating cases is that they are only empowered to make decisions on record. A tribunal can only do what has been vested upon it by enabling legislation, section 39 and regulation 25 of the act, which gives specific and limited power to an appeal tribunal. Instead, communal land boards are empowered to conduct investigations in terms of section 37 of the act.

The outcomes of such investigations must form part of the records which the appeal tribunal should consider when they reach their decisions. It is therefore the duty of a communal land board to ensure that such records are in place. It becomes costly to the government if appeal tribunal members continue to carry out an investigative function.

In most cases, the records are not sufficient, especially if the appeal is against the traditional authority. Experience has shown that many such authorities do not always record their decisions. As a result, some communal land appeal tribunal members use their own discretion, and in the interest of justice allow for further and fresh evidence to be given at the hearings.

This approach is in line with relevant legislations, including the Namibian Constitution. Communal land boards do not feel accountable for the absence of records from the traditional authorities, and rightly so. The central argument is that the Ministry of Urban and Rural Development, which is the parent ministry under which traditional authorities resort, is better-placed to initiate or facilitate capacity building initiatives with regards to record keeping. The land reform ministry can advise or provide support in that regard.

Foulkes (1986) explains that there are bodies which may be called tribunals just because they carry out some of the functions of the tribunals when indeed many of them are not. Some of the functions those public bodies carry out include: executive, recommendatory, investigative and advisory. In terms of section 39 (6) of the act, the duties of the

appeal tribunal could be loosely described as executive/administrative (because they are only expected to review decisions made by other bodies).

In general, a tribunal, although it is not a court of law, exercises an adjudicatory function akin to that of the courts. Foulkes (1986) further highlights that in judicial proceedings the judge is impartial and he listens to the evidence produced before him by the parties and decides between the adversaries on the basis of it. The judge is not there to find out and impose the best possible solution on the basis of information he/she goes out and gets for her/himself, but rather to say whether the charge or complaint is made out in the evidence produced by the parties. His/her "function is judicial, not investigatory or inquisitional. This is in general the function of tribunals". The role of tribunals is to hear appeals from the decisions taken initially by other bodies. The act does not provide details in terms of the duties of communal land appeal tribunals, but the lands ministry has developed procedures for such tribunal hearings deduced from its interpretation of Section 39 and regulation 25 of the act, which are consistent with some of the notions presented in this article.

Generally, the nature of tribunals is such that they may be required to observe the rules of natural justice. The ultimate function of the tribunals in general is to hear appeals. The methodology of undertaking such hearings is highly contested but, may vary depending on the type of appeal tribunal and prevailing circumstances. The accepted norm is that appeal tribunals should carry out a judicial and not an investigatory or inquisitional function.

Therefore, the communal lands appeal tribunal should be able to give directives to communal land boards to gather further information. In fact, appeal tribunal can even in their judgments direct land boards and traditional authorities to provide more evidence where they are clearly missing, instead of holding hearings on the matter. An appeal tribunal, just like a judge, should "not descent to the arena of decision making". In short, this means an appeal tribunal member should remain as objective as possible when deciding a case. However, there is consensus from both the large body of literature and current practices in Namibia that there are exceptional circumstances when tribunals and communal lands appeal tribunals in particular may be required in the interest of justice to allow further and fresh evidence to be presented at the hearing. In his recommendations of tribunals, Wade (1982: 795) clearly refers to a face to face hearing as one of the key functions of appeal tribunals.

Section 39 and regulation 25 of the act which deal with the appeals are silent on whether appeal tribunals are to carry out a judicial or investigative function. The question therefore has remained unanswered and there is no specific guidance to communal lands appeal tribunal members in this regard. This may call for an amendment of the relevant sections and regulations to address this issue.

In the interest of justice and transparency, traditional authorities should be encouraged to keep records of their meetings and decision making processes. The land reform ministry and urban delopment ministry should collaborate to assist the traditional authorities to keep and maintain records in general.

This process could involve capacity building (workshops and training). By law, traditional authorities are expected to do this and if they don't, they are neglecting their duties in terms of the act which may open them up for administrative reviews or even contempt of court. These interventions from the two ministries, if implemented, will help the communal lands appeal tribunals to become more effective.

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