

## LANDMARK COMMUNAL LAND RIGHTS VICTORY

# Same rights as freehold land apply

■ JANA-MARI SMITH

**In a landmark ruling, the Namibian Supreme Court has granted a woman in Zambezi legal ownership of her land under customary laws.**

**A** Zambezi woman has won a landmark Supreme Court appeal on the issue of communal land and her right to legal owner-

ship and compensation under customary laws.

In his judgment, Supreme Court Deputy Chief Justice Petrus Damaseb pointed out the broad implications of his ruling when he addressed the fact that the government of Namibia, the third respondent cited alongside the Katima Mulilo town council and six others, "chose not to participate in the litigation although this case raises an important constitutional issue."

He said their decision not to participate "is a matter for regret because the issues raised in the case

have far wider ramifications than the litigants before court."

Willem Odendaal of the Legal Assistance Centre, who represented appellant Agnes Kashela, said the judgement overruled a High Court ruling by giving people who live under customary law land rights the same rights as people living under common law.

Odendaal argued the case from a constitutional point of view, in that the constitution should apply equally to all in Namibia, whether a person lives on communal or commercial land, with regard to "just compensation as provided for in Article 16 in the Namibian constitution".

Kashela approached the Supreme Court after the High Court ruled against her in a dispute that arose when the Katima Mulilo town council rented and later offered to sell portions of the communal land without compensation.

She argued she had rightfully inherited the land under customary laws.

Her father was allocated a portion of communal land by the Mafwe Traditional Authority in 1985.

After independence, all communal land in Namibia became the property of the state and in 1995 portions of the communal land was transferred to the Katima Mulilo town council.

At the time, Kashela's father was still alive and continued to live on the land until his death in 2001.

Kashela accused the town council of unlawfully taking portions of her

land and unlawfully renting those to a business and four individuals.

She said the council had thus been "unlawfully enriched" at her expense.

In her second claim, she argued that the town council had unlawfully expropriated her land without just compensation at market value.

She asked the High Court to award her the rent received by the council, which amounted to N\$720 000 over three years, plus the amount for which the land was offered for sale, totalling N\$2.415 million, as reasonable and just compensation.

### Overruled

Damaseb set aside the High Court's ruling that Kashela was not entitled to be compensated for land which had been legally transferred as town land to the town council.

The land in question had ceased to be communal land, the High Court ruled, and Kashela had no claim to any communal land tenure rights.

Damaseb's judgment noted that the council's High Court plea was "silent on the allegations made in support of Kashela's second claim, which is predicated on the right to compensation".

He further noted that the council had admitted that it had offered compensation to Kashela, but she had wanted more than their offer.

Further, that it was the council's policy to "compensate persons similarly situated as Ms Kashela".

Damaseb noted that this should have "put the matter to bed and a

judgment given in favour of Ms Kashela".

He said Kashela had acquired a right of exclusive use and occupation of the land in dispute after her father's death under customary laws, and had thus acquired a right of exclusive use and occupation of the land even after its proclamation as town land.

He said this right is enforceable by the courts of law which must, in the case of a breach, tailor a remedy to meet the circumstances of the facts.

He ruled that the state had inherited, as successor-in-title to communal lands, "social obligations" and had to use land "for the public good".

Damaseb added that the state had an obligation to "respect the interest held by affected communities in communal land, for most of whom it was, and remains, the only means of livelihood and survival".

Damaseb set aside the High Court ruling and ordered that the parties meet within ten days of his order to generate a joint case management report on the future conduct of the case on the remaining issues, including fair compensation.

He did not rule on just compensation, which he said was a matter for the High Court, based on his judgement. The costs of the appeal were awarded to Kashela.

The matter was remitted to the High Court for Damaseb to designate a judge to preside over and finalise the matter, especially on compensation.

