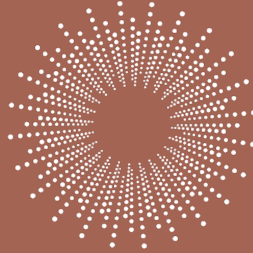


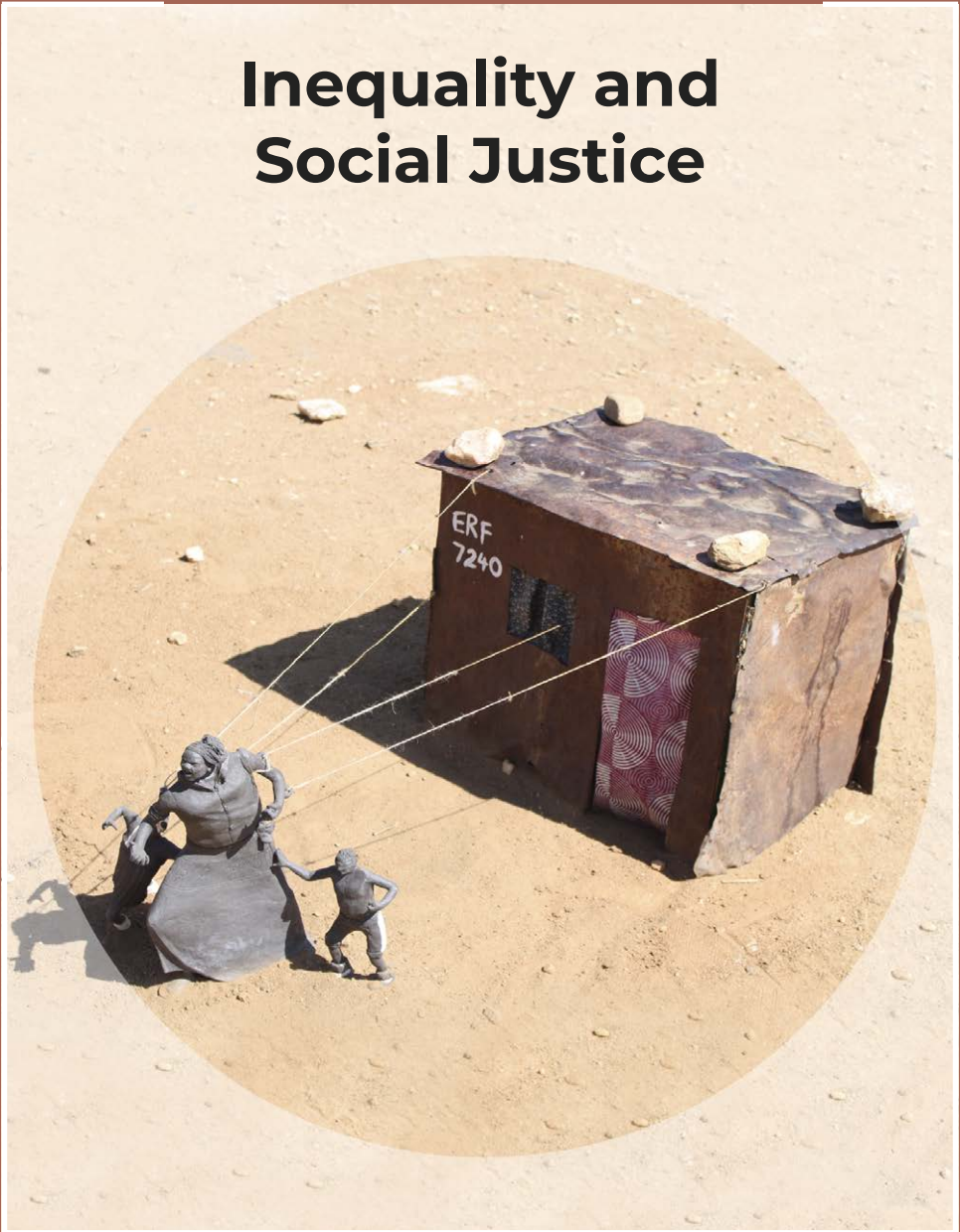
Volume 2

November 2022



Namibian
Journal
of Social
Justice

Inequality and Social Justice



Copyright: Economic and Social Justice Trust 2022



Artwork on the cover: “Pulling into Tomorrow” by Mitchell M. Gatsi

All rights reserved.

No part of this journal may be reproduced, copied or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system without the written permission of the Economic and Social Justice Trust.

ISSN: 2026-8882

Printed by Solitaire Press, Windhoek, Namibia

Inequality and Social Justice

Volume 2

November 2022



**Namibian
Journal
of Social
Justice**

www.namsocialjustice.org

Table of Contents

Acknowledgements	4
Acronyms and Initialisms	5
Editorial	7
Intersectionalities: The Effect of Educational Reform on Inequity Eradication and the Regional Economy in Namibia	26
<i>H. J. Sartorius von Bach and E. A. Nuppenau</i>	
COVID 19 and Inequalities: The Changing Landscape of Inequality and Poverty in Namibia and the Implications of the COVID19 Pandemic	52
<i>Blessing Chiripanhura</i>	
COVID-19 and inequality in Namibia: A vicious syndemic?	76
<i>Bruno Venditto, Ndumba J. Kamwanyah and Christian Nekare</i>	
Mining and Social Justice, Extractivism: Chrome Miners and Corporate Crocodiles: Illicit Financial Flows, Profit Shifting, and Samancor Chrome.....	97
<i>Jaco Oelofsen</i>	
Extractivism and Dispossession: The Case of Kavango Oil and Gas Exploration	113
<i>Rob Parker and Rinaani Musutua</i>	
Gender, Sexuality and Women’s Rights: A Feminist Critique of Institutional Racism and Gender Essentialism: In Defence of Christine Mboma and Beatrice Masilingi.....	118
<i>Ndeshi Namupala and Nashilongweshipwe Mushaandja</i>	
Gender-responsive Budgeting, Gender Equality and the Empowerment of Women.....	135
<i>Lucy Edwards-Jauch</i>	

Religion and Social Justice: Social Justice as Praxis: A Socioreligious and Ethical Analysis.....	161
<i>Basilus M. Kasera</i>	
The Church and Social Justice in Contemporary Namibia	176
<i>Emma N. Nangolo</i>	
Case Study:Land Inequality in Namibia: White Indifference, Elite Capture and Policy Inadequacies	197
<i>Ellison Tjirera</i>	
Case Study from the South: From Farm Workers to Farm Owners	204
<i>Ellen Albertz</i>	
The Tsumib Judgments and their Implications for Asserting Ancestral Land Rights in Namibia.....	210
<i>Willem Odendaal</i>	
Fighting Inequality through Basic Income Support: Lessons from India, Kenya, and Namibia	216
<i>Nkululeko Majozi</i>	
Case Study: Autocracy and Inequality in the Kingdom of Eswatini:	234
<i>Helen Vale</i>	
Opinion Piece: From Collective Bargaining to Collective Begging: Namibia’s Supreme Court Undermines the Right to Strike.....	241
<i>Nixon Marcus</i>	

Acknowledgements

The Economic and Social Justice Trust is proud to present the second edition of the Namibian Journal of Social Justice (NJSJ). This edition, on *Inequality and Social Justice*, follows the 2021 edition, which dealt with *Housing*.

We wish to thank the editor, Prof. **Lucy Edwards-Jauch**, and the co-editor of this edition, Dr **Ndumba Kamwanyah**. We are likewise grateful for the contributions of the other members of the NJSJ editorial board, Ms **Ndeshi Namupala**, Dr **Guillermo Delgado**, Dr **Ellison Tjirera**, Dr **Job Amupanda**, Prof. **Trywell Kalusopa** and Ms **Rinaani Musutua**, and for the commitment towards our journal shown by all our **authors** and **peer reviewers**.

We also thank:

- **William Hofmeyr**, for a comprehensive and meticulous language edit;
- **Bryony van der Merwe**, for the design of the journal's cover page and the layout;

- **Frieda Luehl**, from **the project room Namibia**, for introducing us to the artworks printed in this edition;
- **Lynette Musukubili**, **Mitchell M. Gatsi**, **Dörte Berner**, **Saima Iita**, **Trianus Nakale**, **Rudolf Seibeb**, **Ina-Maria Shikongo**, **Titus Shitaatala**, **Mateus Alfeus** and **Tuli Mekondjo** for making their artworks available for publication; and
- all **photographers** for making their photos available for publication in this journal. They are mentioned in the captions of the photos.

A special word of thanks goes to the **Friedrich Ebert Stiftung Namibia Office**, for their generous support that has made the publication of this volume of our journal possible. In particular, we wish to thank the Country Director, Ms. **Freya Grünhagen**, for her unfailing encouragement, as well as the Project Manager, Ms **Inge Neunda**.

**FRIEDRICH
EBERT
STIFTUNG**
Namibia Office

Acronyms and Initialisms

AMCU	Association of Mineworkers and Construction Union
BEPS	base-erosion profit shifting
BIEN	Basic Income Earth Network
BIG	basic income grant
CCN	Council of Churches in Namibia
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CSOs	civil society organisations
DSD	Differences of Sexual Development
ELCN	Evangelical Lutheran Church in Namibia
ELCRN	Evangelical Lutheran Church in the Republic of Namibia
ESOP	Employee Share Ownership Plan
FMS	Finnish Missionary Society
GBV	gender-based violence
GDP	gross domestic product
GEWE	gender equality and women's empowerment
GRB	gender-responsive budgeting
GRN	Government of the Republic of Namibia
HDI	Human Development Index
HTA	Hai om Traditional Authority
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	information and communication technology
IFFs	illicit financial flows
ILO	International Labour Organisation
IMF	International Monetary Fund
IMR	International Mineral Resources
IOC	International Olympic Committee

LMS	London Missionary Society
MAWLR	Ministry of Agriculture, Water and Land Reform
MGEPEWSW	Ministry of Gender Equality, Poverty Eradication and Social Welfare
MGEPEWSW	Ministry of Gender Equality, Poverty Eradication and Social Welfare
MPI	Multidimensional Poverty Index
MPUCT	Madhya Pradesh Unconditional Cash Transfer
MTEF	Medium-Term Expenditure Framework
NLF	Namibia Labour Force
NNSCH	Namibian Senior Secondary Certificate Higher-level
NPC	National Planning Commission
NSA	Namibia Statistics Agency
NSSCH	Namibian Senior Secondary Certificate Higher
OECD	Organisation for Economic Cooperation and Development
PDS	Public Distribution System
PIT	personal income tax
RMS	Rhenish Missionary Society
SADC	Southern African Development Community
SEM	structural equation modelling
SEWA	Self-Employed Women's Association
TAA	Traditional Authorities Act (No. 25 of 2000)
TVUCT	Tribal Village Unconditional Cash Transfer
UCT	unconditional cash transfer
VAT	value added tax
WHO	World Health Organization
WMMS	Wesleyan Methodist Missionary Society
WSWB	willing-seller-willing-buyer

The Tsumib Judgments and their Implications for Asserting Ancestral Land Rights in Namibia

Willem Odendaal

Introduction

Large parts of Namibia's central northern regions were occupied by the Hai||om during pre-colonial times. This includes the territory of what is today known as Etosha National Park, one of Namibia's foremost tourist destinations. Etosha has since time immemorial been part of the traditional territory of the Hai||om people and on this basis, the Hai||om people are entitled to ownership, or rights of exclusive beneficial occupation, of the land.³⁶ The Hai||om, a former hunter gatherer community in Namibia, is the largest of Namibia's six San (Bushmen) groups in Namibia (*Tsumib* heads of argument, par. 258; see also Dieckmann et al., 2014).

In 1884, "South West Africa", was declared as a German protectorate. At the Berlin Conference the following year, Germany undertook to "watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being" (ibid.). However, Germany did not keep to

this undertaking and participated in a genocide committed against the "native tribes", including the Hai||om and San peoples (ibid.).

In the first decade of the 20th century, the Hai||om's ability to maintain their traditional lifestyle became increasingly restricted by the settlement of white farmers and other groups on their land, the decimation of wildlife by the colonists and further statutory and administrative measures (*Tsumib* heads of argument, par. 10). Most Hai||om people were forced to take refuge in what had been established in 1907 as Game Reserve Number 2, the forerunner of today's Etosha National Park (ibid.).

After the First World War, Germany surrendered South West Africa to the Union of South Africa, which assumed trusteeship over the territory (*Tsumib* heads of argument, par. 11). South Africa was bound by the 1919 Covenant of the League of Nations to enter into a "sacred trust" with the local people and to ensure their well-being and development (ibid.). South Africa

³⁶ Heads of Argument, *Tsumib v Government of the Republic of Namibia* (A 206/2015), par. 61. Hereinafter, *Tsumib* heads of argument.

breached their international fiduciary duties to the local people, including the Hai||om, by causing violations of their human rights and the dispossession of their lands and livelihoods (ibid.).

In 1954, the Hai||om people living in Game Reserve Number 2 were evicted by the South African administration from Etosha; most members of the Hai||om have since then been deprived of access thereto.³⁷

The Hai||om living at Mangetti did not experience the same intrusion upon their land as the Etosha Hai||om (*Tsumib* heads of argument, par. 13). However, in the 1970s, the apartheid administration encouraged Oshiwambo speaking farmers to settle on the land and installed infrastructure there to support white farmers in the area (ibid.). Currently, Mangetti continues to be inhabited by a number of Hai||om members, but their rights over their land remain uncertain (ibid.).

Namibia gained independence in 1990, but that has made little difference in the lives of the Hai||om people. They remain deprived of their land, wildlife and natural resources necessary to practice their traditional lifestyle and culture; they remain poor, dispersed, marginalised and subject to ongoing

discrimination (*Tsumib* heads of argument, par. 14).

After several negotiations with the Government of the Republic of Namibia (GRN) failed to assert the status of their ancestral land rights, the Hai||om people decided to approach the Namibian Courts for an answer.

The Pre-trial Stage

In August 2015, the Legal Assistance Centre filed an application for representative action on behalf of the Hai||om people with the High Court of Namibia. These proceedings were necessary because the GRN and the Hai||om Traditional Authority (HTA) were unable or unwilling to assist the Hai||om to regain rights in their ancestral land (*Tsumib* heads of argument, par. 2). Representative actions, or class actions, are not recognised by the Namibian legal system, and given Namibia's strict rules on standing ("locus standi"), the applicants had to come up with an innovative strategy to convince the High Court to allow the application (see Republic of Namibia, 2014). If the court accepted the applicants' submissions, then they would have been able to take their case to the next stage, namely the representative action. If the Court was not convinced, the application would fail.

³⁷ In 1958 Game Reserve Number 2 became Etosha National Park. *Tsumib* heads of argument para. 12-13.

The eight Hai||om applicants were chosen by the Hai||om over the course of several meetings. The land which is the subject of the claim consists of two parts: firstly, the Etosha National Park; and secondly, the eleven farms in Mangetti West (*Tsumib* heads of argument, par. 1).

Given the HTA's inability and or unwillingness to represent the Hai||om people in the court case, the eight applicants reasoned that if they were not permitted to represent the Hai||om people in the proposed action, the court case would never be brought and the rights of the Hai||om would go unprotected and unfulfilled (*Tsumib* heads of argument, par. 3).

From a total of the 20 respondents cited by the applicants, only the GRN and the HTA opposed the application. Both argued that in terms of the provisions of the Traditional Authorities Act (25 of 2000) (TAA), only the HTA has the right to represent the Hai||om in litigation (*Tsumib v Government of the Republic of Namibia*, 2019, par. 38). The GRN also argued that the Hai||om people's ancestral land rights have been extinguished (GRN's heads of argument, in *Tsumib* p. 32). In the absence of statutory law supporting ancestral land rights in Namibia, the applicants mainly relied on constitutional and comparative international law to advance their case (*Tsumib* heads of argument, par. 5).

The Applicants' Six Claims

While not critical to the Hai||om people's case at the application stage, the six claims gave a hint to the court as to the claims the applicants would want to advance during the ensuing action trial stage.

The first claim is a property rights claim, based on communal property rights held under customary law, the common law, the right to property in terms of article 16 of the Namibian Constitution, and article 14 of the African Charter, read together with the applicable international law. The applicants claim that the Hai||om are entitled to ownership, or rights of exclusive beneficial occupation, of the land (*Tsumib* heads of argument, par. 61).

The second claim is a natural resources rights claim and is based on article 21 of the African Charter read with article 15 of the International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal Peoples and the right of all people to self-determination established under article 1 of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The applicants claim that the Hai||om are the owners of the natural resources, the right to those natural resources and compensation for

unlawful interference with that right (*Tsumib* heads of argument, par. 63).

The third claim is a right to development claim and is based on article 22 of the African Charter, read with article 7.1 of ILO 169 and the right of all people to self-determination established in article 1 of the ICCPR and article 1 of the ICESCR. The applicants claim that the Hai||om people want their right to develop their land and compensation for interfering with that right (*Tsumib* heads of argument, par. 66).

The fourth claim is brought as an alternative claim to the main claim, the property claim. It is based on the Hai||om's beneficial occupation and use of their ancestral lands under Hai||om customary law, the common law and article 16(1) of the Namibian Constitution read with the applicable international law, including article 14 of the African Charter and articles 13 and 14 of ILO 169 (*Tsumib* heads of argument, par. 68 & 69). This claim is for a declarator of the Hai||om's right to beneficial use (*Tsumib* heads of argument, par. 70).

The fifth claim is a claim for cultural and religious rights and is a further alternative to the property claim. It is based on articles 19 and 21(1)(c) of the Namibian Constitution, articles 8, 17 and 22 of the African Charter, articles

1, 18 and 27 of the ICCPR, articles 1 and 15 of the ICESCR, articles 2.2 and 5(e) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), article 30 of the Convention on the Rights of a Child (CRC) and articles 8(j) and 10(c) of the Convention on Biological Diversity (CBD). The claim supports the Hai||om's right to practice their religion and culture on the land within the Etosha National Park (*Tsumib* heads of argument, par. 72 & 73).

The sixth claim, the discrimination claim, is based on the government's duties to redress the discriminatory dispossession of the Hai||om's land. These duties require the government to provide the Hai||om with their ancestral land and to take various further steps to redress the discrimination faced by the Hai||om People under colonial and post-colonial rule

The primary relief sought in all six claims is ownership, occupation and/or use of the subject lands, and recognition of the historical violations of Hai||om rights (*Tsumib* heads of argument, par. 88). If successful in their claims, the applicants stated that they have no intention of doing away with the current tourism activities in the Etosha National Park. However, they want an opportunity for the Hai||om to participate in the management of the park and to benefit from proceeds of

its tourism activities (*Tsumib* heads of argument, par. 25).

The High Court Judgment

The application was heard in November 2018 and judgment was given in August 2019. The High Court held that the HTA is the only competent body to launch the action sought by the applicants (*Tsumib*, High Court Judgment, par. 39). The court also held that the effect of the order sought by the applicants would be to lead to the establishment of a parallel representative and decision-making structures for the Hai||om people, which is prohibited by the TAA and constitutes a criminal offence (*Tsumib*, High Court Judgment, par. 49). If the order was granted, the court argued, it would usurp the authority of the HTA that has jurisdiction over the Hai||om people (*Tsumib*, High Court Judgment, par. 53). The court concluded that the applicants have not exhausted internal remedies provided for by the TAA in asserting their rights nor have they challenged the constitutionality of the provisions of the Act that they perceive to be an obstacle in the way of asserting their rights (*Tsumib*, High Court Judgment, par. 61). Consequently, the High Court dismissed the application.

The Supreme Court Judgment

The Supreme Court heard the appeal in November 2021 and judgment came

out in March 2022. The Supreme Court held that the TAA did not have the effect contended for by the respondents and upheld by the High Court (*Tsumib*, Supreme Court Judgment, p. 3). Despite the fact that the TAA did not confer exclusive competence on a traditional authority such as the HTA, however, the applicants were not entitled to the relief they sought. This is because the applicants sought a remedy that was not recognised by the Namibian legal system (*Tsumib*, Supreme Court Judgment, p. 36).

According to the court, the applicants had to show that the common law on standing should be developed to provide for a representative action along the lines they propose. They failed to do so because existing forms of legal organization could be deployed to litigate the contemplated action (*Tsumib*, Supreme Court Judgment, p. 89).

The court held further that members of the Hai||om community could have organised themselves in an unincorporated voluntary association of persons to pursue the intended civil claims (*Tsumib*, Supreme Court Judgment, p. 78). The community could also have adopted a constitution or passed customary laws regulating such matters as who is authorised to institute and defend litigation on behalf of the community (*Tsumib*, Supreme

Court Judgment, p. 3). In addition, the mechanism proposed to determine who is a member of the Hai||om people and who should benefit from the proposed action is also not appropriate because this is to be determined by them subject to an untenable oversight burden placed upon the courts (*Tsumib*, Supreme Court Judgment, para. 83 & 84). Finally, the court held that the applicants had failed to demonstrate the inadequacy of the available remedies under existing law (*Tsumib*, Supreme Court Judgment, para. 75). Consequently, the Supreme Court dismissed the appeal, although for different reasons than those given by the High Court.

Conclusion

The above two judgments are a blow to the Hai||om people and to other communities' efforts to assert their rights over what they regard as their ancestral lands. While this blow is not fatal, the two judgments demand a rethink of strategy as to how the courts could be approached in future on matters regarding ancestral land rights. It is also clear from the two judgments that Namibian courts remain vigilant over the non-relaxation of the courts' restrictive rules on standing. Both judgments are disappointing, because neither of the two courts considered the application of constitutional and well-established comparative international law, and how these

could support the rights of indigenous peoples' land rights. Given the ongoing battle to solve Namibia's ancestral land rights question, this might have been an opportune time to consider the broader implications of applying the well-established comparative international law precedents on ancestral land rights to the current Namibian situation. Nevertheless, given the recommendation by the *Commission of Inquiry into Claims of Ancestral Land Rights* and Restitution in 2020 that Parliament should develop suitable legislation to support ancestral land rights claims in Namibia, the two judgments could provide some important insights into how this could be achieved in future.

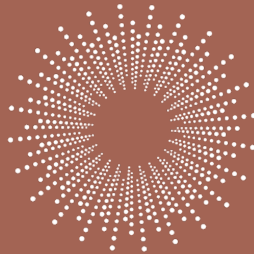
References

Dieckmann, U., Thiem, M., Dirx, E. & Hays, J. (eds.). (2014). "*Scraping the Pot*": *San in Namibia Two Decades after Independence*. Legal Assistance Centre and Desert Research Foundation of Namibia.

Republic of Namibia. (2014). *Locus Standi Discussion Paper*. Law Reform and Development Commission (LRDC 27).

Tsumib v Government of the Republic of Namibia (A 206/2015) [2019] NAHCMD 312 (28 August 2019)

Tsumib v Government of the Republic of Namibia (SA 53/2019) [2022] (16 March 2022)



Namibian
Journal
of Social
Justice

Namibian Journal of Social Justice
Inequality and Social Justice

Volume 2, November 2022
ISSN 2026-8882

