



NATIONAL ASSEMBLY

SEPTEMBER 2024

CONTRIBUTIONS TO THE ROADS BILL BY HON. ELMA JANE DIENDA, MP

Honourable Speaker,

Honourable Members,

According to *Section 18 of the Communal Land Reform Act*, on the Prohibition Against Fences, no fence of any kind may be erected on any portion of land within a communal land area after the commencement of this Act, nor may any existing fence on such land be retained after a date specified by the Minister in the Gazette, unless authorisation for the erection or retention has been granted in accordance with the provisions of this Act, subject to any prescribed exemptions.

With reference to the proposed *Road Bill*, specifically Part 6 on the fencing of trunk, main, and district roads, *Clause 30 (2)* currently states that the Roads Authority or the Minister *may*, in the prescribed manner, erect fencing on either side of a trunk, main, or district road in communal land, or across such a road.

Honourable Speaker,

Honourable Members,

Clause 30 (2) of the Roads Bill presents a fundamental contradiction with *Section 18* of the existing Communal Land Reform Act, which prohibits the erection or retention of any fence on communal land without specific authorisation. *Section 18* of the *Communal Land Reform Act* promotes the communal lifestyle and ensure that individuals living in these areas maintain communal ways of life, which often involve mobility in search of water, grazing lands, or fertile farming land and more. This lifestyle is integral to the livelihoods of communities in communal areas, where access to land is shared and not restricted by private ownership or permanent boundaries.

In contrast, *Section 30 (2)* of the proposed *Road Bill* empowers the Roads Authority or Minister to erect fences along trunk, main, or district roads within communal lands. This provision, while aimed at improving road reserve safety, runs counter to the communal land ethos where unrestricted movement is essential. Fencing off roads, particularly main roads, will significantly limit the ability of people to access vital resources such as grazing fields and water sources. It risks disrupting the communal land system by imposing artificial barriers, which could inhibit the free movement of livestock and the seasonal migration of communities.

Furthermore, fencing in communal lands will create tensions between the need for road reserve safety and the traditional rights of communities. While road safety is a legitimate concern, particularly to prevent accidents involving unattended livestock, the communal land system in Namibia is based on collective access and use of land, rather than exclusionary practices like fencing. The introduction of

fencing, especially on main roads, is not a viable solution because it will inadvertently result in the restriction of community movement, causing social and economic disruption and is also quite expensive, how will the government fund this exercise?

Honourable Speaker,

Honourable Members,

In Tebele v Kauketu, the court provided important jurisprudence regarding farmers' liability to their animals. The defendant, Kauketu, argued that there is no general duty on communal farmers to fence off public roads traversing their properties, explaining that his cow involved in the accident had been kept in a gated kraal but was later released for grazing in the commonage. Despite attempts by a farm worker to return the full herd, approximately 15 to 20 animals, including the cow in question, remained in the commonage overnight. This cow caused a motor vehicle accident. Judge Hannelie Prinsloo ruled that the defendant was negligent in failing to properly contain his livestock at night, especially given the known dangers to motorists from straying animals. The court found that this negligence contributed to the accident. However, the judge also applied the doctrine of contributory negligence, noting that the plaintiff's driver had contributed to the damages. As a result, the court awarded 70% of the claimed damages, requiring the defendant to pay N\$45,606.30 out of the N\$65,151.86 claimed, with the plaintiff responsible for the remaining 30%.¹

¹ *Tebele v Kauketu* (HC-MD-CIV-ACT-DEL-2022/00072) [2024] NAHCMD 86 (8 March 2024)

In light of this established jurisprudence of the High Court as seen in *Tebele v Kaukuetu*, it is clear that communal farmers will be held liable for negligence when their livestock aren't properly contained, especially when such negligence poses a danger to motorists, cause car accidents or any other harm on the road reserve. The courts have already recognized that there is a duty on cattle owners to ensure that their animals do not roam unattended potentially creating hazardous conditions.²

Given this, it is both logical and prudent to formalize this principle into law. *Part 9* of the Roads Bill on Domestic Animals should therefore include a specific sub-clause addressing the issue of negligently leaving animals unattended resulting in circumstances where they may stray onto public roads causing accidents. This sub-clause should make it explicitly unlawful for any owner, lessee, or occupier of land—whether in communal or commercial areas—to negligently allow their animals to roam or graze in a manner that endangers road reserves. The owners of the said animals should be held liable for damages. By codifying this responsibility, the law would establish a clear duty of care, promoting better livestock management and reducing the risks associated with animals straying onto roads, which has already proven to be a significant issue.

Lastly, in the interest of protecting the road reserves and ensuring public safety, it should be a legal requirement that all livestock owners own a well-maintained kraal or enclosure. Livestock must be kept in these respective kraals at night to prevent them from roaming onto public roads unattended, which can lead to dangerous accidents. Many lives have been lost due to livestock straying onto roads because

² *Tebele v Kaukuetu* (HC-MD-CIV-ACT-DEL-2022/00072) [2024] NAHCMD 86 (8 March 2024).

of the negligence of their owners in ensuring that these animals are securely contained at night.

Honourable Speaker,

Honourable Members,

Under *Clause 41 (1)*, which allows the Minister to prescribe the manner in which domesticated animals are allowed to be in the road reserve, the underlying objective is presumably to manage and protect the road reserve for safety and infrastructure purposes. However, this raises a fundamental question: if the primary goal is to protect the road reserve and ensure the safety of road users, why would there be any need for domesticated animals to be permitted in the road reserve at all?

Allowing animals in the road reserve seems contradictory to the very purpose of safeguarding the area, as the presence of animals poses a clear hazard to motorists and increases the likelihood of accidents. Moreover, the road reserve serves as a buffer zone for traffic and should remain free from obstructions, including animals, to maintain safety standards. If the objective is truly to protect the road reserve, then the law should focus on preventing animals from entering this space altogether, rather than outlining how they may be permitted within it.

In light of this, it would be more consistent to amend *Clause 41 (1)* to explicitly prohibit the presence of unattended domesticated animals in the road reserve. This approach would align with the overarching goal of maintaining safety and protecting both road infrastructure and road users.

I so move Honourable Speaker.