



REPORTABLE

CASE NO: SA 31/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**HENDRIK ISMAEL WITBOOI
SIMON OTTO JACOBS
WITBOOI TRADITIONAL AUTHORITY**

**First Appellant
Second Appellant
Third Appellant**

and

**SALOMON JOSEPHAT WITBOOI
ELIZABETH KOCK WITBOOI
CHRISTINA FREDERICKS
ANNA JACOBS
PENIAS EDUART TOPNAAR
MINISTER OF URBAN AND RURAL
DEVELOPMENT
PRESIDENT OF THE REPUBLIC OF NAMIBIA
COUNCIL OF TRADITIONAL LEADERS
ATTORNEY-GENERAL
GOVERNOR OF THE HARDAP REGION**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent**

Coram: DAMASEB DCJ, SMUTS JA and MAKARAU AJA

Heard: 7 November 2023

Delivered: 30 November 2023

Summary: This is an appeal that concerns the dispute of the succession to the leadership of the Witbooi (/Kwowese clan). Following Dr Hendrik Witbooi's (the clan's last chief) appointment to a government office, he together with other members of the Royal Family nominated Mr Christian Rooi to act as a chief until the year 2015 when he passed on. The position of chief thus became vacant.

The actual processes of identifying and designating a substantive successor commenced in 2009, after the death of Dr Hendrik Witbooi. During 2015, first appellant and first respondent who are both members of the Royal Family emerged as the two competing candidates for the position. Around the same year, the two competing applications for designation were submitted to the Minister for approval. The Minister referred the two applications to an Investigation Committee in terms of s 12 of the Traditional Authorities Act 20 of 2000, which made various recommendations. The Minister accepted the recommendations of the Investigating Committee and in turn communicated these to the parties. The parties were further directed to adhere to these recommendations. The period stipulated in the report of the Investigating Committee for the resolution of the dispute lapsed without a solution in sight and the dispute remained unresolved.

In 2018 and at the specific invitation of the Minister, the candidates submitted new applications for approval of designation with appellant's application submitted by the Witbooi Traditional Authority and the respondent's application by the Royal Family. Upon receipt of the two applications, the Minister held separate meetings with the contesting parties. He, in addition, sought the opinion of the Attorney-General on the issue as to who between the two contenders qualify to be the next Chief of the clan. He was advised that the customary law of the clan follows the patrilineal line and the appellant was the only candidate who qualifies according to the clan's law of succession. Acting on this advice, the Minister decided to approve the application of the first appellant. He communicated his decision in this regard to the contesting parties. Aggrieved by the decision of the Minister, the first respondent amended an application that was pending before the High Court and sought to have the Minister's

decision reviewed. He was successful and the decision was set aside with ancillary relief. The appeal herein lies against that judgement and orders of the court *a quo*.

On appeal to this Court, the court was faced with three main issues for determination. These are firstly, whether the Minister was *functus officio* when he approved the application for the designation of the first appellant as Kaptein of the Witbooi (/Khowese) clan; secondly, whether the application submitted to the Minister was valid; and thirdly, whether the decision of the Minister was discriminatory and therefore unconstitutional. Respondents support the judgement and reasoning of the court *a quo*.

Appellants on the other hand took issue with the points raised in the judgement and submit firstly that, the decision of the Minister was more of a directive and therefore not final in nature, entitling the new Minister to make a fresh decision. Secondly, it was submitted that there is no distinction between the Traditional Council and the Traditional Authority. Therefore, the fact that appellant's application was submitted by the Traditional Council does not render it invalid. Thirdly, it was submitted that the customary law and practice of the clan follows a patrilineal lineage and the Minister simply applied the law as it is. There is thus no discrimination on that basis.

Held that, the directives given by the Minister were not conditional or optional. They were final in nature. Thus, when the Minister purported to approve the application for the designation of the first appellant as leader of the Witbooi (/Khowese) clan, he was *functus officio* and at law, precluded from making a fresh and alternative decision in the matter. Overall, the submission of the subsequent applications for approval in this matter was a nullity due to the fact that the Minister was *functus officio* when the applications were submitted.

Held that, the law giver has not only expressly created two separate juristic bodies but has proceeded to allocate a specific duty to one and not to the other. On this basis,

the reasoning of the court *a quo* that the application for the approval of the designation of the first appellant was by the wrong body could be faulted.

Held that, on the basis of the twin doctrines of subsidiarity and ripeness, the remarks *a quo* on the constitutionality of the decision of the Minister were unnecessary. The remarks were pre-mature and the matter that was before the court *a quo* could have been competently determined and therefore should have been determined applying the common law principles of administrative law.

Held that, the dispute between the parties stands to be resolved in accordance with the directives given by the Minister in 2017. In the event that the authorised members of the Royal Family cannot still agree on one candidate, the community must elect the next Kaptein of the clan. To this end, the Traditional Authority may seek guidance from the Minister.

Held that, the delay relating to the late noting of the appeal has been fully explained and is *bona fide*. The application for condonation is granted.

Consequently, the appeal stands to be dismissed against the appellant.

APPEAL JUDGMENT

MAKARAU AJA

Introduction

[1] In my view, it is most undesirable that matters of succession to the leadership of any traditional community, under the customary law of that traditional community, be resolved by the courts. Such matters are more amenable to resolution by the communities concerned, adopting and employing the traditional mediatory and conciliatory practices of dispute resolution. Such conciliatory practices seek, in the main, to heal and narrow the divisions in the community rather than tear the

community further apart as does a formal judgment of the court, which by its very nature, must be in favour of one of the parties and against the other. Invariably, decisions of the court in such matters tend to turn on technical points, taken at adjectival law, and, seldom deal with the substantive customary law issues arising.

[2] Such is the appeal in this case. It is an appeal that concerns the dispute of the succession to the leadership of the Witbooi (/Khowese) clan. It is an appeal against the whole judgment and orders of the High Court, ('the court *a quo*'), delivered on 5 April 2022, whose operative orders read:

- '2.1 The decision taken by the Minister of Urban and Rural Development ("the Minister"), on 23 April 2019 alternatively on 22 May 2019, approving the application for the designation of Mr. Hendrik Ismael Witbooi ("Third Respondent") and in terms of which the Third Respondent was designated as the Kaptein of the Witbooi (/Khowese) clan is hereby reviewed and set aside.
- 2.2 All the processes and/or steps taken following the Minister's decision, and in particular the following steps be and are hereby set aside:
 - 2.2.1 the First respondent's notification of his decision to the President in terms of section 6 (1) of the Traditional Authorities Act 20 of 2000;
 - 2.2.2 the President's recognition and designation of the Third respondent as the Kaptein (Chief) of the Witbooi (/Khowese) clan by way of proclamation in the Government Gazette on 15 August 2019.
 - 2.2.3 the First, Third, Seventh and Eighth Respondents be and are hereby ordered to pay the costs of this application jointly and severally, the one paying, and the other being absolved consequent upon the employment of one instructed and two instructed legal practitioners.

2.2.4 Such costs shall, to the extent applicable, be subject to the provisions of Section 17 of the Legal Aid Act, No 29 of 1990.

2.2.5 The matter is removed from the roll and is regarded as finalised.'

Background facts

[3] The facts forming the backdrop to this appeal are largely common cause. I summarise them below.

[4] The Witbooi (/Khowese) clan is one of the gazetted traditional communities of Namibia. It is headed by a Kaptein. Its last substantive Kaptein was Dr. Hendrik Witbooi, who upon being appointed as a Minister in the government of the Republic of Namibia, relinquished his responsibilities as such. He, with the approval of the authorised members of the royal house, appointed Christian Rooi as an acting Kaptein. Christian Rooi was to continue to hold the position of acting Kaptein after the death of Dr. Hendrik Witbooi in 2009 until he passed on in 2015.

[5] Following the death of Dr. Hendrik Witbooi in 2009, the processes of identifying and designating a substantive successor commenced.

[6] The first appellant alleges that his name was suggested for nomination to the position of Chief of the clan before the death of the Acting Kaptein in 2015. However, because of concerns regarding his membership of a certain church, the community

elders or a section thereof advised him that the first respondent would be nominated in his stead, which was subsequently done.

[7] I pause here momentarily to note that the first respondent disputes that the first appellant's membership of this named church had any bearing on the designation of the next chief of the clan. However, whether or not the first appellant was side-lined for nomination because of the concerns surrounding his membership of the church is of no import in the determination of this appeal. What is material for this appeal, and is not in dispute, is the fact that the first appellant and the first respondent emerged as the two competing candidates for the position.

[8] In or around 2015, the two competing applications for designation were submitted to the Minister for approval. The Minister referred the two applications to an Investigation Committee in terms of s 12 of the Traditional Authorities Act 20 of 2000, ('the Act').

[9] The Investigating Committee made certain recommendations to the Minister. These were as follows:

- '3.9.1 The Witbooi Royal Family must be afforded an opportunity to resolve their Royal Family succession issue without involvement of non-Witbooi Royal Family members.
- 3.9.2 If they fail to resolve the succession dispute, they must seek assistance from the Nama Traditional Leaders Association under the aptitude of the Regional Governor.

3.9.3 The succession dispute issue should be resolved and finalised within the period of six (6) months from the date of receiving the letter from the Hon. Minister of Urban and Rural Development on the outcome of the Investigating Committee Report.

3.9.4 Should the Witbooi Royal Family fail to resolve the succession dispute within the stipulated period under 3.9.3 herein above, election should be held as a last resort to select the new *Kaptein* since both candidates are from the Royal Family though their lineages to the Royal Family are different in the sense that the one candidate descends from matrilineal line and the other one descends from patrilineal side.'

[10] The Minister accepted the recommendations of the Investigating Committee and in turn communicated these to the parties. It is common cause that she then directed the parties to adhere to the recommendations of the Investigating Committee.

[11] The period stipulated in the report of the Investigating Committee for the resolution of the dispute lapsed without a solution in sight. No election was subsequently held in accordance with the directive from the Minister and the dispute remained unresolved.

[12] In 2018, the Royal Family submitted to the Minister (now the current Minister), a fresh application for the approval of the designation of the first respondent. The application was submitted through the Governor, firstly for endorsement and thereafter transmission to the Minister. The Witbooi Traditional Authority also submitted an application for the designation of the first appellant as the next *Kaptein*.

It would appear that both applications were submitted at the specific invitation of the Minister. The Governor submitted both applications to the Minister, having endorsed only the one relating to the first appellant.

[13] Upon receipt of the two applications, the Minister held two separate meetings with the contesting parties. He, in addition, sought the opinion of the Attorney-General on the issue as to who between the two contenders qualifies to be the next Chief of the clan. He was advised that the customary law of the clan follows the patrilineal line and the appellant was the only candidate who qualifies according to the clan's law of succession. Acting on this advice, the Minister decided to approve the application of the first appellant. He communicated his decision in this regard to the contesting parties. Aggrieved by the decision of the Minister, the first respondent amended an application that was pending before the High Court and sought to have the Minister's decision reviewed. He was successful and the decision was set aside with ancillary relief as set out above.

Proceedings before the court *a quo*

First respondent's case

[14] In seeking to have the decision of the Minister set aside, the first respondent raised five grounds of review. Firstly, he alleged that the Minister failed to adhere to the principle of legality. In this regard the first respondent contended that the law empowers the Minister to approve an application that is submitted to him in accordance with s 5(1) and meets the requirements set out in s 4(1) of the Act. In the absence of a finding that the first respondent's application as submitted failed to meet

one or more of the requirements as set out, the Minister had to approve the application and his failure to do so was a failure to act in accordance with the powers conferred on him by the law.

[15] Still under the first ground of review, the first respondent further contended that the Minister did not utilise the powers conferred upon him by the law to seek clarifications if this is what he needed. Fully developed, the contention was that if the Minister was concerned about the line of descent of the first respondent to the royal house, and this information was required by him for purposes of approving the application for designation, the law empowered him to seek clarification and any further information necessary. Using that power, the Minister ought to have sought such clarification or additional information from the authorised members of the Witbooi Royal Family, which he did not do. The law does not empower him to decline the application or to deploy the mechanism established under s 12 of the Act and declare a dispute as he did, the argument continued.

[16] In view of the fact that the Minister failed to follow the procedures laid down in the Act, it was contended that he breached the principle of legality. It was also the first respondent's contention that the Minister ought not to have declared a dispute in terms of s 12 as there were no facts giving rise to the deployment of the mechanism. The Minister on his own or solely on the basis that he had received two applications, had no power to trigger the mechanism set up in s 12 of the Act. It was further contended that the mechanism can only be triggered by the authorised members of the community who must submit a written petition to the Minister, jointly signed by the

parties to the dispute. To the first appellant's knowledge, no such joint petition was signed and submitted to the Minister in accordance with the provisions of the statute.

[17] As his second ground of review, the first respondent contended that the decision taken by the Minister to approve the designation of the first appellant was irrational and/or unreasonable. It was argued that the Minister had misconstrued and conflated the powers of the community with the powers of the authorised members of the Royal Family. Not seeing the difference between the two, the Minister referred a dispute arising within the community at large as relevant when the law does not vest the community with any power to designate a Kaptein for the clan. The relevant dispute must have arisen within the authorised members of the Royal Family.

[18] It was further contended that it was unreasonable and / or irrational for the Minister to make the decision that he did, after he was advised by the authorised members of the Royal Family that the nomination and application for approval of the first appellant by Mr. Johannes Richter had been withdrawn. That nomination had also been made by a person who was not an authorised member of the Royal Family. There was thus only one valid nomination for the consideration of the Minister and it was accordingly unreasonable, in the circumstances, for the Minister to then approve an application that had been withdrawn.

[19] The first respondent contended in the third ground of review that the Minister was biased and did not act impartially. He referred to remarks that were allegedly made by the Minister during a meeting with the members of the Royal Family to the

effect that the first appellant is the one that qualified to be designated as the next Kaptein of the clan as the first respondent traced his descent to the Royal House through his mother. The decision taken by the Minister to approve the application of the first appellant served as evidence that he was not impartial in the whole process.

[20] In the fourth ground of review, the first respondent contended that the decision of the Minister was discriminatory and unconstitutional. In this regard, it was argued that the reliance by the Minister on the application of a patrilineal lineage to the exclusion of matrilineal lineages as the sole basis for his decision is in conflict with Art. 10 of the Constitution.

[21] Finally, it was contended that the Minister was bound by the *functus officio* doctrine. In this regard, the first respondent referred to the directives that were given by the Minister following the recommendations of the Investigating Committee, which in part enjoined the Royal House to agree on one candidate. On the basis of this directive, it was alleged that Mr. Johannes Richter was approached to withdraw his nomination and application for the designation of the first appellant which he duly did. The Minister was advised of such withdrawal which he did not consider or give effect to. It was contended that the Minister was bound by the decision directing the Royal House to resolve the matter by agreeing to only one candidate and to resolve the matter themselves.

The Minister's case

[22] In defending the legality and validity of the decision that he had taken on May 22nd to approve the application of the first appellant, the Minister indicated that he had applied his mind to the two applications that came from the members of the Witbooi clan and had also considered the verification process that was conducted by the Governor, the report from the Investigating Committee and his own analysis from the consultative meeting he had held with the contesting candidates and their respective supporters.

[23] Regarding his alleged failure to comply with the procedures set out in s 5(1) of the Act as detailed in the first ground of review, the Minister contended that he had complied with the law in that he read the report of the Investigating Committee, he met with the two contesting delegations and had read further documents regarding the history of succession of the Witbooi (/Khowese) clan as well as solicited the opinion of the Attorney-General on the matter.

[24] Maintaining that the pre-requisites for triggering the mechanism under s 12 existed, the Minister submitted that the dispute between the parties was not declared on the basis of the two applications but as a result of the petition that was received from a section of the Royal Family that was against the installation of the first respondent. Further, no members of the Royal Family or of the traditional community protested against the establishment of the Investigating Committee. He also highlighted that the first respondent was ambivalent regarding the Investigating Committee as in one breath he argued that it was illegal and in another, that the

Minister was bound by its findings. The Minister further contended that the existence of a dispute is not only identifiable by the presentation of a petition in terms of s 5 (1) of the Act.

[25] The Minister asserted that the nomination of the first appellant was made in accordance with the customary law of the clan and that the application for approval of the designation of the first appellant was submitted by a duly authorised person.

[26] Regarding the allegation that he was *functus officio* when he took the decision to approve the first respondent's application, the Minister argued that the recommendations in the report of the Investigating Committee had lapsed.

[27] In responding to the allegation that the nomination of the first appellant was validly withdrawn, the Minister submitted that when Mr. Richter withdrew his nomination of the first appellant, another eligible person nominated him.

Appellants' case

[28] In addition to aligning himself with the position adopted by the Minister, the first appellant incorporated the points of law made by the Minister as if specifically made by him. He accordingly prayed for the review application to be dismissed as being baseless.

[29] In the main, the first appellant maintained that he is the only eligible candidate for the position of Kaptein of the clan as he hails from the patrilineal line as opposed

to the first respondent, who hails from the matrilineal line. He was nominated for succession by the authorised members of the Royal Family. He attached three confirmatory affidavits from Mr. Cooper, Mrs. Johanna Sophia Witbooi and from Mrs Johanna Richter. He further referred to the fact that his application had been verified and signed by the Governor.

[30] The above, in summary, were the competing submissions and arguments by the parties before the High Court. They were then supplemented by oral argument during the hearing of the matter.

The decision of the court a quo

[31] In its decision, the court *a quo* was quite clear that the matter that was before it was a review of the decision that had been taken by the Minister to approve the designation of the first appellant as the next Keptein of the Witbooi clan. The court was also clear that the review of the Minister's decision was sought in the main, on the basis that it was in conflict with the provisions of the Traditional Authorities Act. The court also recognised that the first respondent had, in addition to the ground of illegality, alleged that the decision of the Minister was in any event, unreasonable, irrational, discriminatory and unconstitutional.

[32] It was the view of the court that it was necessary to set out the applicable legal framework, which it proceeded to do. In this regard, the court adverted to the definition of the term "designation" as set out in the Act before it cited in full the provisions of s 4 of the Act that deal with the designation of traditional leaders. The

court noted that the law provided for two types of traditional communities, one with a Royal Family and one without. Where the community has a royal house, the designated leader must be a member of the royal house and where there is no royal house, the designated leader may be any member of that community.

[33] Applying the law to the facts of the application that was before it, the court noted that in the case of the Witbooi clan, it has a Royal Family and it was that Royal Family, acting in accordance with its customary law, which had to designate one member of the family as its leader.

[34] The court then adverted to one particular point that had been made by the first respondent in his heads of argument. The point made was that the appellants had proceeded from a wrong legal premise in terms of the approval of the first appellant's designation. From their papers, it was clear that it is the Witbooi Traditional Authority that made the application for approval. This was evident from the letter written on 13 May 2019 titled "Succession letter". The letter was on the letterhead of the Traditional Authority and was signed by Mr. Simon Otto Jacobs in his capacity as Senior Councilor of the Traditional Authority and head of its administration.

[35] On the basis of the above, the court agreed with submissions made on behalf of the first respondent that the application for the approval of the first appellant was not in accordance with the provisions of the Traditional Authorities Act. It was thus the finding of the court that the application for approval had been made by the wrong body. The appropriate body to have made the application was the Traditional Council.

[36] Being of the considered view that the application seeking the approval of the first appellant's designation was defective, the court proceeded to find that any approval made by the Minister on the basis of the defective application is plainly unlawful and cannot bring about any legal consequences. In the ultimate, and primarily on this basis, it was the court's finding that the approval of the designation of the first appellant was a nullity which had to be set aside.

[37] In explaining its finding as detailed above, the court *a quo* discussed the differences between a Traditional Authority and a Traditional Council. It noted that these are two separate bodies endowed with separate and distinct powers and functions. These powers cannot be exercised interchangeably. It was the court's further view that the appellants appear to have dealt with the wrong body. The court further observed that even the Minister appears to have overlooked the provisions of the Act and believed that he could receive an application for approval from a Traditional Authority. The Minister ought to have rejected the application, the court reasoned.

[38] Accepting as correct the submission made on behalf of the first respondent, the court found that the application for the approval of the first appellant's designation was not in accordance with the Act. In consequence thereof, the Minister's approval was a nullity. In its own words:

'All said and done, it becomes clear that the application for the approval of the third respondent designation was not authorized in terms of the Act. The Minister's approval thereof is accordingly a nullity. The applicant's application, in my considered view, must succeed.'

[39] The above constitutes the *ratio decidendi* of the judgment of the court *a quo* on the application for review. Put differently, it is the point upon which the application turned and was decided. The application succeeded because in the view of the court, the application for the designation of the first appellant submitted to the Minister for approval was not in accordance with the provisions of the governing Act.

[40] Having pronounced itself as detailed above, the court *a quo* however proceeded, in what I consider to be additional *ratio decidendi*, to dispose of the other issues that the grounds of review had raised. In this regard, the court *a quo* was clear that it was determining the remaining issues out of an abundance of caution and in the event that it had erred in its finding that the application approved by the Minister is a nullity at law. In its view, the court did not however have to determine all the issues that arose from the papers. It decided only three of the issues. These related to whether or not the Minister was *functus officio* when he approved the application designating the first applicant as Kaptein of the Witbooi (*/Khowese*) clan, whether the Minister abdicated his duty to consider the application when he adopted wholesale, the opinion of the Attorney-General and whether the Minister's decision was discriminatory and unconstitutional.

[41] I again pause here momentarily to note that the approach taken by the court *a quo* in the above regard was correct. It proceeded to determine the other issues for

the benefit of the appeal court, in the event that the appeal court was not with the court *a quo* on its first and main finding.

[42] In the submissions made on behalf of the first respondent *a quo*, it had been contended that at the time the Minister approved the application designating the first appellant as Kaptein, he was *functus officio* as his predecessor in office had adopted a recommendation that the dispute be resolved by way of an election. The correctness of the submission appears to have been conceded on behalf of the Minister by his counsel in oral submissions made before the court. Counsel then implored the court to use its discretion in the interests of justice not to rely on this ground of review.

[43] Relying on *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia & others*¹, the court was of the view that at the time he made the impugned decision, the Minister was *functus officio*. In this regard, the court re-affirmed the principle that once an administrative body has exercised an administrative discretion in a specific way in a given case, it loses any further jurisdiction in the matter and cannot have a second bite at the cherry, so to speak.

[44] It had also been argued on behalf of the first respondent that in approving the application, the Minister had not applied his mind to the matter and had abdicated this duty and obligations to the Attorney-General. The court was of the view that there was merit in this submission, based on the evidence that was before it and in

¹ *Pamo Trading Enterprises CC & another v Chairperson of the Tender Board of Namibia & others* 2019 (3) NR 834 (SC).

particular, the averments that the Minister had made in his answering affidavit and annexures. The evidence seemed to indicate that the Minister had accepted, without any input from himself, the opinion of the Attorney-General as indicating the correct and only position in the matter. In the view of the court, this amounted to an impermissible abdication of power by the Minister.

[45] Finally, the court dealt with the contention that the decision of the Minister was discriminatory and therefore unconstitutional. In this regard, the court noted that there was a dispute on the papers regarding the content of the customary law of the Witbooi clan on succession and which dispute could not readily be resolved without the calling of oral evidence. The court went further to hold that assuming that the contentions advanced by the first appellant as to the Witbooi succession law was correct, then and in that event, the decision of the Minister, in accepting the version of the first appellant as to the succession law of the clan, without necessarily deciding the correctness of that version, is in violation of the Constitution in that it discriminates against women. In its own words:

‘This accordingly leads me to the conclusion that the applicant’s contention that the decision by the Minister accepting the customary law version of the respondents, without necessarily deciding on the correctness of the customary law, is in violation of the Constitution in that it discriminates against women. For that reason, the decision of the Minister, approving the third respondent’s designation, cannot stand and must be set aside.’

[46] Before reaching that conclusion, the court had adverted to the provisions of Art. 10(1) and (2) of the Constitution which it cited in full. In its view:

‘. . . The equality clause tells us that all people, without exception, despite their differences, which might be apparent, shall be equal before the law. This includes men and women. It would be appear, regard had to the customary practice in this case, assuming that the respondents’ case is an accurate account of the relevant customary law, namely, that men and women are not treated equally, when it comes to issues of succession to the office of the Kaptein. This is because the customary law as the respondents have it, leans in favour of men and against women.’

[47] After dealing with another issue regarding the representation of the first appellant together with the Minister by the Office of the Government Attorney, which issue is not material in the determination of this appeal, the court *a quo* disposed of the matter by making the order that is fully set out above.

[48] Dissatisfied with the order of the court, the appellants noted an appeal to this Court. They raised a number of grounds which I do not seek to reproduce. I advert to some of the grounds when I summarise the submissions of the parties.

The parties’ submissions on appeal

[49] The appellants’ submissions in support of the merits of the appeal were made under the following headings: “non-compliance with s 4(1) of the Act; *functus officio*; discrimination based on lineage and abdication by the Minister”. For convenience I will use the same headings merely for the purpose of summarising the arguments that were made by the parties under each heading. I do so notwithstanding that counsel for the first appellant took a chronological approach to the above issues. Further, and

in view of the fact that the arguments from the parties did not differ in material respects from the arguments that had been made *a quo*, I will not set them out in full.

Non-compliance with s 4 (1) and s 5 (1) of the Act

[50] The appellants restated the fact that the first appellant was designated as a Chief by the second appellant who is a senior Traditional Councilor in the Witbooi Traditional Authority. It was their specific case that the second appellant is authorised to make an application for the designation of a chief as he duly did in respect of the first appellant. It was thus the appellants' case that the designation of the first appellant by the second appellant was in accordance with the provisions of s 4 (1) of the Act. I note in this regard that the appellants appear to have used the terms "designation" and "application" interchangeably and as meaning the same thing.

[51] It was further suggested that no distinction is made between the Traditional Authority and the Traditional Council as in some instances letters from the Traditional Council were stamped with the Traditional Authority stamp.

[52] It was contended that the Traditional Authority and the Traditional Council are not two distinct bodies as the Council is the body that manages the day-to-day affairs of the Authority, similar to the board of directors of a company. On this basis it was further contended that the application for the designation of the first appellant was signed by the second appellant who must be regarded as a representative of the Traditional Council.

[53] In oral submissions before the court, it was specifically argued on behalf of the appellant that, in practice, there is no difference between the Traditional Council and the Traditional Authority. They are to a large extent composed of the same membership and perform the same functions.

[54] *Per contra*, the respondent argued that the appellant concludes wrongly that it is the Traditional Authority that must make the application for the approval of a designation. The correct position, it was further argued, is that it is the Traditional Council that must make the application since juristically, the two bodies are separate and distinct.

[55] Further, it was the respondent's position that the Traditional Authority and the Traditional Council are two separate legal personae whose functions and roles must not be conflated or confused. Maintaining that the application seeking the approval of the designation of the first appellant had been submitted by the wrong body, the respondents asserted that such application must emanate from the Royal Family.

Was the Minister functus officio when he made the decision to approve the first appellant's designation?

[56] The appellants contended in the main that the decision by the Minister in 2015, following the recommendations of the Investigating Committee was not a final decision and therefore could not be a basis for holding that the Minister was *functus officio*.

[57] The argument by Ms Angula for the appellants was twofold. It was firstly that there was no prior “decision” to ground the defence. What the Minister did when she accepted the recommendations of the Investigating Committee was to take a preliminary decision that did not resolve the dispute and was therefore not final. The Minister was still seized with the dispute and could still make another decision on the matter. Further and in any event, counsel argued, the decision to adopt the recommendations of the Investigating Committee was not a decision to approve the application which was subsequently done.

[58] The respondents on the other hand argue that the decision of 2015 giving the parties directives following the recommendations of the Investigating Committee was an administrative decision lawfully taken by the Minister to resolve the dispute. Because the decision was not set aside, it bound the Minister subsequently and precluded him from making a fresh decision as he did.

Discrimination based on lineage

[59] It was contended on behalf of the appellant that the first respondent was not discriminated against on the grounds of sex or social status. He simply did not qualify for the position in terms of the customary law of the clan, the argument proceeded to hold. Alternatively, it was argued that differential treatment based on lineage is not a violation of Art. 10 (2) of the Constitution of Namibia.

[60] On behalf of the respondents it was argued that any differentiation between the children of daughters and the children of sons to succeed a common grandparent would fall foul of the Constitution of Namibia. The differentiation between matrilineal descent and patrilineal descent as was in this case was in essence such a distinction, the argument concluded.

Abdication by the Minister

[61] The first appellant contended that there were no facts before the court from which it could be concluded that the Minister had solely relied on the opinion of the Attorney-General to reach his decision and did not apply his mind to the issue. The opinion of the Attorney-General merely served as confirmation of the findings of the Investigating Committee as to the applicable customary law.

[62] It was further argued that in view of the fact that a finding that the Minister had abdicated his responsibilities was not part of the prayer in the review application, the court *a quo* improperly and *mero motu* came to that finding. This court was urged not to make a finding in this regard as this was not an issue between the parties *a quo*.

[63] The respondents submitted that the Minister adopted lock, stock and barrel the opinion of the Attorney-General as evidenced by the contents of the letter that the Minister then wrote to the parties, indicating his decision to approve the application submitted on behalf of the first appellant.

The issues for determination

[64] Whilst the appellants have raised a number of grounds of appeal, in essence these grounds bring up three issues for determination. These are firstly, whether the Minister was *functus officio* when he approved the application for the designation of the first appellant as Kaptein of the Witbooi (/Khowese) clan; secondly, whether the application submitted to the Minister was valid; and thirdly, and, to the extent that it becomes necessary to deal with it, whether the decision of the Minister was discriminatory and therefore unconstitutional.

[65] I frame the issues in this order deliberately. The first issue may be dispositive of this appeal. This is so because if it is the finding of this court that the Minister was *functus officio* when the application was submitted to him, the determination of the remaining issues may not be necessary save for completeness of the record.

[66] In framing the issues as I do to exclude the question whether or not the Minister abdicated his duties under the Act, I am in agreement with the submission by counsel for the appellant that such was not an issue before the court *a quo*. The averment was made by the Minister that he acted as he did on the basis of the opinion. To that extent, it cannot be an issue before this court. In any event, the opinion of the Attorney-General was on an issue that does not arise for determination in this appeal. Quite evidently, it is not an issue for this court's determination as to who is the rightful successor to Dr Hendrik Witbooi. It was also not an issue over which the Minister had any adjudicative jurisdiction in terms of the Act.

Analysis.

Was the Minister functus officio when he decided to approve the application for the designation of the first appellant as Kaptein of the Witbooi (/Khowese) clan?

[67] The determination of this issue turns, in my view, on whether or not the Minister made a decision in 2017 following the recommendations of the Investigating Committee. The background facts leading up to the appointment of the Investigating Committee are common cause. The outcome of the proceedings of the committee are also common cause. The report of the committee was attached to the papers filed of record.

[68] It is further common cause that the Minister not only communicated the recommendations of the Investigating Committee to the parties, but also used these as the basis upon which she crafted her directives to the parties. Therefore, it cannot be disputed that as at the time the Minister communicated the findings of the Investigating Committee to the parties it was her unequivocal decision that the dispute between the two divisions of the Witbooi Royal Family be resolved in accordance with the directives that she had given.

[69] The directives given by the Minister were not conditional or optional. They were definitive and final. The directives concluded with the creation of an opening for the parties to approach the Minister for any further assistance necessary to implement the directives. That opening remains and can still be utilised to seek guidance on how to implement the remaining or outstanding part of the directives.

[70] I note in particular that s 12 (3) of the Act enjoins the Minister upon receipt of the report of the Investigating Committee to take a decision to resolve the dispute in question. It reads:

‘(3) The Minister shall on receipt of the report referred to in subsection (2) take such decision as he or she may deem expedient for the resolution of the dispute in question.’

[71] In *this case*, the Minister decided to take wholesale the recommendations of the Investigating Committee for implementation in ending the dispute. She was entitled to do so. This then constituted her decision on how to resolve the dispute expediently.

[72] Thus, in my view, the directives by the Minister had all the attributes of a final administrative decision taken to resolve the succession dispute that had been presented to her. Carried through to the letter, the directives would have resulted in ending the dispute, albeit not to everyone’s satisfaction.

[73] Not only was the decision of the Minister final in its effect, it also reached the point of finality for the purposes of the law when it was communicated to those affected by it. It also became binding on them and defined or crystallised their respective positions.

[74] On the basis of the above, I am unable to agree with the appellants’ argument that the directives from the Minister were not final in nature.

[75] Further, and in any event, a decision taken in terms of s 12 of the Act is an alternative to a decision taken in terms of s 5. A decision taken in terms of s 12 is only taken when approval cannot be granted because of a dispute arising from the designation of a candidate or candidates. Both are final in nature.

[76] The law on when and how an administrator becomes *functus officio* after making an administrative decision is settled. The rationale behind the law in this regard is but an aspect of ensuring finality, certainty and fairness. The recipients of the decision are to be guided by the decision until such is set aside to protect them from an arbitrary change of mind by the decision maker. For the position at law, I can do no better than refer to and adopt the remarks of this court in *Hashagen v Public Accountant's and Auditor's Board*² which aptly lay down the position that :

‘An administrative decision is deemed to be final and binding once made. Such a decision cannot be re-opened or revoked by the decision-maker unless authorized by law, expressly or by necessary implication. . . .’

[77] The above remarks serve to emphasise what this Court held in *Pamo Trading* that administrators must have lawful authority to do everything they do or seek to redo. Whilst the court was describing the principle of legality, this applies with equal force to the doctrine of *functus officio*. An administrator can only revisit a decision lawfully made if authorised by the same law to do so.

² *Hashagen v Public Accountant's and Auditor's Board* 2021 (3) NR 711 (SC) at para 27.

[78] It is therefore my finding that when the Minister purported to approve the application for the designation of the first appellant as leader of the Witbooi (/Khowese) clan, he was *functus officio* and at law, precluded from taking a fresh and alternative decision in the matter. In making this finding, I note for the record that it was not argued that the law authorises the Minister to revisit his or her decisions made in terms of s 12 of the Act. I find no such law in the empowering statute.

[79] In making the finding that I do above, I am also aware that the appellants have argued that all the parties to the dispute, including the Minister, appear not to have regarded the recommendations of the Investigating Committee as more than such as the Minister continued to entertain the parties and did not try to enforce her earlier decision.

[80] Whether or not an administrative decision has been made is objectively tested. Once such is established, it is binding not only on the parties affected by the decision but on the decision-maker as well. The subjective views of the parties on the nature of the decision is not necessarily binding on the court.

[81] I also make the above findings notwithstanding that *a quo*, the first to fifth respondents had challenged the establishment of the Investigating Committee upon which the first and only binding decision of the Minister was based. On appeal, the challenge to the establishment of the s 12 procedures and mechanism was abandoned and instead, it was argued that the first decision of the Minister was binding and precluded the Minister from making a different decision on the matter.

[82] The net effect of the finding I make above is that the dispute between the parties stands to be resolved in accordance with the directives given by the Minister in 2017. In the event that the authorised members of the Royal Family cannot still agree on one candidate, then and in that event, the community must elect the next Kaptein of the clan. To this end, the Traditional Authority may seek guidance from the Minister on how to arrange and administer the election.

[83] The above finding marks the turning point of this appeal.

[84] In view of the above finding, it may not be strictly necessary to advert to the other grounds upon which this appeal was argued. However, for completeness of the record, I will briefly turn to deal with the remaining two issues. These are firstly, whether the appellant's application was validly submitted and, secondly, whether the decision of the Minister to approve the application of the first appellant on the basis that he did, was unconstitutional.

Non-compliance with s 5 of the Act.

[85] It is common cause that the application for approval in relation to the designation of the first appellant was submitted by the second appellant, Simon Otto Jacobs, a Senior Traditional Councilor. It is also common cause that s 5(1) of the Act provides that the Chief's Council or Traditional Council of that community, as the case may be, shall apply to the Minister for approval to designate a chief or head of that community. Senior Traditional Councilors are not included in the provision.

[86] As stated above, it was the finding of the court *a quo* that the application for approval of the designation of the first appellant was not valid, having been made by the wrong body. It ought to have been made by the Traditional Council and not by the second respondent acting for and on behalf of the Traditional Authority.

[87] In oral argument before the court it was suggested that in practice, there is no distinction between the two bodies and the application for the approval of the first respondent's designation ought to have been regarded as emanating from the Traditional Council. In this regard, reference was made to the remarks of the High Court in *Haindaka v Minister of Urban and Rural Development & others*³, where the Traditional Council in relation to the Traditional Authority was compared to a board of directors which runs the day to day affairs of an incorporated company. Whilst the analogy may have been apt in that case, it is not of much assistance in this appeal. This is so because firstly and more importantly in my view, the submission of the application for approval in this matter was a nullity due to the fact that the Minister was *functus officio* when the applications were submitted and secondly, the purposive interpretation of the statute as given in *Haindaka (supra)* appears to run counter to the express language used in the section. In my view, the law giver has not only expressly created two separate juristic bodies but has proceeded to allocate a specific duty to one and not to the other. On this basis, the reasoning of the court *a quo* that the application for the approval of the designation of the first appellant was by the wrong body cannot be faulted.

³ *Haindaka v The Minister of Urban and Rural Development & others* 2019 (4) NR 951 HC, para 80.

Whether the decision of the Minister was unconstitutional?

[88] What has exercised my mind regarding this issue is whether it was properly raised for determination *a quo* and in this appeal. I am aware that the first to fifth appellants specifically raised the issue as part of their grounds of review *a quo* and the respondents equally made submissions in response.

[89] It is common cause that the law governing succession to the leadership of a traditional community is partly the customary law of that community and partly the provisions of the Act. The customary law of the community concerned and the Act therefore constitute the primary sources of law that inform the cause of action and the defence to such a cause of action in any suit brought before the courts concerning a succession dispute.

[90] Firstly, correctly understood, the essence of the dispute between the parties was the applicable customary practice of the community. This is an aspect of the content of the customary law of the community. The content of the customary law was thus not agreed upon. Before that correct content of the customary law of the community was established by evidence adduced and assessed on a balance of probabilities, it was in my view premature to decide whether or not the customary law of the clan is unconstitutional. The issue was not ripe for adjudication. It was too early to pronounce on the constitutionality or otherwise of a law yet to be established. In the circumstances, it is my considered view that the court *a quo* ought to have shied away from making any findings on the matter, even tentative ones.

[91] Secondly, having been brought as a review, the matter turned to be resolved on the application of the principles of administrative law. There was no indication on the record that recourse to the principles of administrative law would have failed to resolve the suit that was before the court *a quo*.

[92] In practice, where a matter is capable of resolution by applying the principles of the common law or the provisions of a statute, the need to interpret the Constitution is obviated and becomes unnecessary as the application of the subsidiary law can and should provide an adequate remedy. It is only in instances where the interpretation of the Constitution is necessary to effect a remedy that a decision must turn directly, and in the first instance, on the provisions of the Constitution. This has given rise to the doctrine of constitutional subsidiarity discussed in detail by Cameron J in *My Vote Counts NPC v Speaker of the National Assembly & others*⁴. Put in the abstract, and to borrow from the language of Cameron J, subsidiarity in litigation denotes ‘a hierarchical ordering of principles or of remedies, and signifies that the central or higher norm, should be invoked only where the more local or concrete norm, or detailed principle or remedy does not avail.’ Put differently and simply, subsidiarity in litigation denotes a ranking of enforcement of laws, where the constitution as the supreme law is only invoked because there are no adequate remedies in either the common law or relevant statute. Thus, where it is possible to decide a criminal or civil case without reaching a constitutional issue, that should be done.

⁴ *My Vote Counts NPC v Speaker of the National Assembly & others* [2015] ZACC 31.

[93] On the basis of the twin doctrines of subsidiarity and ripeness, it is my considered view that the remarks *a quo* on the constitutionality of the decision of the Minister were unnecessary. The remarks were pre-mature and the matter that was before the court *a quo* could have been competently determined and therefore should have been determined applying the common law principles of administrative law.

[94] Using the same twin principles, I refrain from determining the issue.

Application for condonation.

[95] There is an unopposed application for condonation for the late noting of the appeal in terms of rule 7(1) of the Rules of this Court. The appeal was noted one day out of time. The delay has been fully explained and is *bona fide*. It was occasioned by the late response regarding whether or not the appellant was eligible for state funding in prosecuting the appeal.

[96] The delay was not inordinate. The explanation for the delay is satisfactory. Further, no prejudice was suffered by the respondents as a result. The appeal raised some arguable points. Therefore, notwithstanding the disposition of the appeal, the application for condonation is granted.

Conclusion.

[97] As stated above, the law governing the appointment and succession of traditional leaders in this jurisdiction like in one or two other jurisdictions in Southern Africa, is an amalgam of the application of customary laws and statutory law. The customary law of each community is for this purpose preserved and applied for the

purposes of identifying and qualifying the candidate for appointment whilst the provisions of the statute are general and provide for the uniform and consistent recognition of candidates so identified and qualified by the concerned communities. Where, therefore, the traditional community has successfully identified and qualified its candidate for designation, the content of the customary law used in the process cannot be inquired into and is protected from scrutiny by the appointing authority. The customary law so used can thus be patrilineal, matrilineal or a combination of the two or some other law that the traditional community agrees upon as representing their customs and traditions.

[98] Where the community successfully identifies a candidate for designation, the Act provides for the procedures and steps to be taken in having the candidate designated. In this case, and for a number of reasons, the traditional community failed to identify and qualify a candidate for designation. It identified and qualified two candidates for the one position. Due to the divisions in the community, the statutory procedures and steps laid out in the Act were also not followed correctly in respect of the first appellant.

[99] The law maker envisaged the occurrence of disputes in the identification and selection of candidates for appointment as traditional leaders and provided for a dispute resolution procedure and mechanism in s 12 thereof. This in the main, entails the appointment of an Investigating Committee.

[100] In terms of s 12, once an Investigating Committee has made recommendations to the Minister, the Minister is obliged to consider those recommendations and decide on how to resolve the dispute expediently. Due to the divisions within the Witbooi (/Khowese) clan, the dispute resolution procedure and mechanism as set out in s 12 of the Act was duly triggered. The Investigating Committee that was set up made recommendations to the Minister in due course. After considering the recommendations, the Minister decided on how to resolve the dispute. She thereafter issued certain directives in that regard. The dispute stalled at that stage.

[101] Having duly communicated it to the affected parties, the decision by the Minister became a final administrative decision which binds her and her successors in office as well as the parties to the dispute. Again in my view, having made an administrative decision as empowered by the Act, the Minister and her successor in title became *functus officio* and could not lawfully take another decision in the matter. To the extent that the Minister purported to take another decision in the matter by approving the application for the designation of the first appellant as Kaptein of the Witbooi (/Khowese) clan, such decision was null and void for being in violation of the *functus officio* doctrine. The Minister, with all the good intentions he might have had to end this long-running dispute, no longer had the competence at law to make another decision in the matter.

[102] It matters not that the parties and the Minister continued to engage after the Minister became *functus officio*. Quite evidently, the further engagements and the steps taken by the parties were taken oblivious of the applicability of the *functus*

officio doctrine. Accordingly, they have no import at law and cannot confer or create any legal rights, entitlements and/or obligations.

[103] Having turned on the above issue, the appeal stands to be dismissed against the appellant.

[104] For the avoidance of doubt, the issue on whether the decision of the Minister was unconstitutional has not been determined in this appeal as it was not ripe for determination *a quo* and consequently not ripe for determination in this appeal. Further and more importantly, the dispute *a quo* was quite capable of resolution simply on the application of principles of administrative law, without invoking the provisions of the constitution. In keeping with the doctrine of subsidiarity, the dispute ought to have been resolved on the basis of the subsidiary law. I in turn, determine this appeal purely on the application of the subsidiary law, which is administrative law.

Costs

[105] Regarding costs, I see no justification for departing from the general position that costs follow the cause. No such justification has been argued.

Order

[106] In the result, I make the following order:

- (a) The application for condonation for the late filing of the appeal is granted.

- (b) The appeal is dismissed with costs, including the costs of one instructed and one instructing legal practitioner.

MAKARAU AJA

DAMASEB DCJ (Concurring)

[107] I have had the benefit and privilege of reading in draft the lucid and erudite judgment by my sister, Makarau AJA. I pen these few lines to concur with her reasoning and the order she proposes. First of all, I wish to echo her sentiment that issues of traditional leadership succession are best resolved by the concerned traditional communities and preferably not through acrimonious litigation in courts. As the main judgment recognises, litigation is a zero-sum game: There is always a winner and, regrettably, a loser.

[108] It is cause for regret that there is hardly a traditional leadership succession in our country which has not come to the courts – or come to pass without rancour.

[109] There is a matter of grave import that I wish to make a few observations on. It is dealt with, to my satisfaction, at para [82] of the main judgment. Makarau AJA records:

[82] The net effect of the finding I make above is that the dispute between the parties stands to be resolved in accordance with the directives given by the Minister in 2017. In the event that the authorised members of the Royal Family cannot still agree on one candidate, then and in that event, the community must elect the next Kaptein of the clan. To this end, the Traditional Authority may seek guidance from the Minister on how to arrange and administer the election'. [Emphasis is mine].

I agree.

[110] The obvious question that arises, of course, is how and by whom such an election is to be conducted; and most importantly how it is going to be financed. It is important that should an election become inevitable, it is conducted transparently and in a manner that eschews disputes that will, again, end up in the courts. I say this to make the point that guidance from the Minister on that process is going to be critical to the success of an election, should it take place. The main judgment leaves no doubt that in such an election the involvement of the Minister is a choice that the Traditional Authority should make.

[111] It will be desirable that the Minister's guidance, if sought and given, is reduced to writing and duly published and, most crucially, after the Minister has invited and considered representations from the community and the individuals who will stand as candidates.

[112] For the avoidance of doubt, I agree, without reservation, with the reasons and order proposed by Makarau AJA.

[113] I too would dismiss the appeal and order costs against the appellant as proposed.

SMUTS JA (Concurring)

[114] I had the benefit of reading the detailed and well-reasoned judgment prepared by Makarau AJA. I agree with the conclusions reached in it and concur in the proposed order.

[115] I have also had the distinct pleasure of reading the concurring judgment prepared by the Deputy Chief Justice. I entirely agree with the sentiments lucidly articulated in it concerning guidance which can be sought and usefully given by the Minister relating to the holding of the contemplated election.

SMUTS JA

APPEARANCES

APPELLANTS:

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FIRST TO FIFTH RESPONDENTS:

R Töttemeyer (with him Y Campbell)

Instructed by Dr Weder, Kauta & Hoveka

Inc.