NOT REPORTABLE

CASE NO.: A 312/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

Keharanjo II Nguvauva **Applicant**

and

Ovambanderu Traditional Authority **1st Respondent**

The Council of the Municipality of Okahandja **2nd Respondent**

Kilus Nguvauva **3rd Respondent**

Ripuree Tjozongoro **4th Respondent**

Inspector-General of the Namibia Police **5th Respondent**

CORAM: PARKER J

Heard on: 2010 October 27

Delivered on: 2010 November 4

JUDGMENT:

PARKER J:

[1] By the facts set out in the launching affidavits on which the applicant relies for the relief sought, the applicant approached the Court and obtained a rule *nisi* in terms appearing in the order that the Court *(per* Botes J) granted on 16

October last. The burden of the Court in the instant proceedings concerns whether that rule *nisi* should be confirmed or discharged. Mr Corbett represents the applicant, and Mr Frank SC, assisted by Dr Akwenda, represents the 1st, 3rd and 4th respondents. There is no appearance by the 2nd and 5th respondents; neither did they file any opposing papers. Accordingly, for the sake of clarity, I shall hereinafter refer to the 1st, 3rd and 4th

respondents simply as 'the respondents'.

[2] I now proceed to consider the question of the applicant's *locus standi.* I do so at the outset because if I find that the applicant has no *locus standi* in bringing the application and obtaining a rule *nisi* that should be the end of the matter: such a decision is dispositive of the application.

[3] On the papers, the irrefragable fact that stares in the face of the Court is that the applicant is not the Paramount Chief ('chief' in terms of the Traditional Authorities Act, 2000 (Act No. 25 of 2000)) ('the Act') of the Ovambanderu Community ('the Community'). The cruciality of this indubitable fact will become apparent in due course. In fact, when the applicant brought the application and obtained a rule *nisi,* as aforesaid, the applicant was very much aware that he was not the Paramount Chief; and, *a fortiori,* the applicant knew also that the Community has no reigning Paramount Chief. The significance of this critical state of affairs will also become clear shortly. *A priori,* I hold on the authority of *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) that at the time that the applicant launched the said application no Supreme Council of the Traditional Authority of the Community, properly constituted, existed.

[4] In terms of article 5 (b) of Chapter 8 of the Ovambanderu Constitution (a copy of which is filed of record) ('the Constitution') the Supreme Council is the highest executive and policy-making body of the Authority and it consists of (a) the Paramount Chief ('chief', according to the Traditional Authority Act 2000 (Act No. 25 of 2000), (b) all Senior Traditional Councillors, (c) *Ozondangere,* (d) all General Field Marshalls of the

Green Flag and (e) Head of the Traditional court.

[5] It is therefore my view that the applicant, who states in his founding affidavit that he has been trained in the customary law, customs and traditions of the Community - and I have no good reason to doubt the veracity of the applicant's averments in that behalf - knew very well that at the time he brought the application and obtained a rule *nisi* (as aforesaid) there was no reigning Paramount Chief of the Community and accordingly there was no Supreme Council of the Authority, properly constituted, which would be competent and would have full power to legitimately and lawfully consider the supremely important issue as to whether Mr. Peter Nguvauva ('the deceased') was a personality who, accordingly to the customary law, customs and traditions of the Community, is qualified to be buried at a 'sacred' burial ground of the Community. And yet, with the greatest deference, the applicant arrogated to himself, not as part of a collective membership of any organ of the Authority (and this is significant for our present purposes), a capacity, a competence or an entitlement - all based on falsity, misconception and ill-advice - to bring the application. I shall return to this conclusion in due course in view of the submission by Mr. Corbett about the entitlement of the applicant *qua* member of the community to bring the application.

[6] On the papers it seems to me clear that the applicant brought the present application under the settled belief - misplaced, in my respectful view - that as the 'designated' chief of the Community he was as good as the substantive Paramount Chief of the Community, and so he has the requisite capacity and entitlement to bring the application. Accordingly, having perused the applicant's launching papers, I have not one iota of doubt in my mind that the applicant did launch the application in his capacity as an ordinary, common-floor member of the Community who is on a one-man

crusade to ensure that the customary law, customs and traditions of the Community are not violated, as Mr Corbett from the Bar urged the Court to accept. If that was the basis of the applicant's *locus standi,* I fail to see why the applicant did not set out this important averment in his launching affidavit. I shall return to this significant conclusion shortly.

[7] It is trite law that appropriate allegations to establish the *locus standi* of an applicant should be made in the launching affidavits not in replying affidavits (Erasmus, *Superior Court Practice* (1995): p. B1-39 and the cases there cited) -and definitely, in my opinion, not in oral submission by counsel from the Bar. In a truly rearguard action, Mr. Corbett submitted that as a member of the Community, the applicant is entitled to bring the application. That may be so; and that may or may not have been in the head of the applicant when the applicant launched the application, but one does not plough a piece of land by turning it in one's head. By a parity of reasoning, as I have intimated previously, it is a well-settled and an incontrovertible rule of practice of the Court that in motion proceedings an applicant approaches the Court upon facts, set out in the applicant's founding papers, on which the applicant relies for relief. Doubtless, rule 6 (1) of the Rules says so plainly and clearly. The Court cannot, therefore, permit the applicant's counsel, in counsel's oral submission, to introduce new facts which do not appear anywhere in the applicant's papers, as Mr. Corbett has done.

[8] As respects the applicant's standing to bring the application, Mr. Frank SC submitted that as Paramount Chief-designate, the applicant has only a contingent right which is not sufficient to found his *locus standi* in this matter. I accept this submission. It is good law and valid. Besides, I have gone further to describe the facts as I have

found them to exist in this application *in terra firma,* and these are that the applicant is not the Paramount Chief of the Community and there is not in existence the Supreme Council of the Authority of the Community, properly constituted, which would, as I have said, be the highest body with full powers in terms of the Constitution of the Community to consider the issue which has brought the applicant on a wrong route to the Court. What is more, the term

'Paramount Chief-designate' has no meaning in the provisions of the Constitution of the Community. It follows inexorably and reasonably that, in my judgement, the applicant has no *locus standi in judicio* as respects the application. Furthermore, I have already rejected as irrelevant Mr. Corbett's submission that as a member of the Community the applicant is entitled to bring the application and that is what the applicant has done. With respect, that argument is as self-serving as it is fallacious.

[9] It is trite that in motion proceedings the affidavits filed of record constitute both pleadings and the evidence. *(Stipp and another v Shade Centre and others*

2007 (2) NR 627 (SC)) It is clear from the applicant's papers filed of record that

the applicant has failed to establish that he has *locus standi* to bring the present application. I, therefore, uphold the respondents' preliminary objection on the point. But then Mr. Corbett submitted that since the subject matter of the application is sensitive and finality in it is called for, it is important to deal with the merits even if the objection on *locus standi* succeeded. With the greatest deference to counsel, I cannot accept counsel's supplicatory submission: it is surely a recipe for chaos in the business of the Court. Acceptance of the submission would indubitably create a very dangerous and uncontrollable precedent. What it amounts to is that any busybody, meddling and misguided crusader, would approach the Court when he or she knows he or she has no *locus standi* and nevertheless argue at the end of the day that the merits of the matter

should be heard because the subject matter is sensitive and is important to a certain community or certain communities of the country.

[10] It is worth noting that it is trite that an applicant in application proceedings stands or falls by what in his or her papers he or she has placed before the Court. *(Fish Orange Mining Consortium (Pty) Ltd v Ghandy Gerson #Gaoseb and others* Case No. A209/2008 (Unreported)) From the aforegoing, *in casu,* the applicant must fall by what the applicant has placed before the Court.

[11] For all the aforegoing reasoning and conclusions, I hold that it would be unreasonable, unsatisfactory and unjudicial to confirm the aforementioned rule *nisi.* Having so held, I do not think it would be proper for this Court to consider any striking out matters or other interesting points raised by the parties.

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

(1) The rule *nisi* granted on 16 October 2010 is discharged.

(2) The applicant must pay the respondents' costs, such costs to include costs occasioned by the employment of one instructing counsel and two instructed counsel.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:	Adv A W Corbett
Instructed by:	Dr Weder Kauta & Hoveka Inc
COUNSEL ON BEHALF OF THE 1ST, 3 RD and 4TH RESPONDENTS:	Adv T Frank SC Adv Dr S Akwenda
Instructed by:	Lorentz Angula Inc