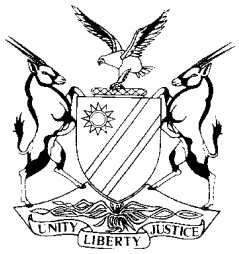

'Unreportable'

CASE NO.: A 254/2010

IN THE HIGH COURT OF NAMIBIA

In the matter:

Ex Parte

ERASTUS TJIUNDIKUA KAHUURE **First Applicant**

ALETHA KARIKONDUA NGUVAUVA **Second Applicant**

In re:

KEHARANJO II NGUVAUVA

and

MINISTER OF REGIONAL AND LOCAL GOVERNMENT AND HOUSING AND RURAL DEVELOPMENT **First Respondent**

MBANDERU TRADITIONAL AUTHORITY **Second Respondent**

KILUS NGUVAUVA **Third Respondent**

***CORAM*:** **PARKER J**

Heard on: 2012 June 13

Delivered on: 2012 June 26

JUDGMENT

PARKER J: [1] The applicants, namely, Erastus Tjiundikua Kahuure (first applicant) and Aletha Karikondua Nguvauva (the second applicant) have brought an application on notice of motion for an order for leave to intervene in a review application. In that application the decision of the Minister of Regional and Local Government, Housing and Rural Development ('the Minister') that an election be held to determine the successor to the late Chief Munjuku Nguvauva (who was the recognized chief ('the late Chief') of the Ovambanderu Community ('the Community') is taken on review. The second and third respondents have moved to reject the application. Mr Hinda represents the applicants, and Mr Frank SC the second and third respondents. At a status hearing held on 16 May 2012, Ms Machaka, legal representative of the first respondent, indicated to the managing judge that the first respondent was not opposing the application to intervene.

[2] I do not wish to garnish this judgment with the history spreading as a backdrop to the ongoing situation in the Community which is no stranger to the Court and the general public. Suffice to refer to a chapter of it – which, I think, is relevant in these proceedings. As Mr Frank submitted, it is evident and common cause from the papers filed of record in the review application that there were two contenders vying to succeed to the chieftaincy of the Community at the time the review application was launched. Both contenders, as appear on the papers, are sons of the late Chief; they are Keharanjo II Nguvauva (deceased), the applicant, and Kilus Nguvauva, the third respondent in the review application.

[3] Subsequent to the death of Keharanjo II Nguvauva, Aletha Karikondua Nguvauva, the second applicant was, according to Mr Hinda (in his submission) 'the designated and coronated Paramount Chief of the Ovambanderu Traditional Community and was duly recommended and approved as such in terms of the

Ovambanderu customary law and is the reigning Queen by virtue of her marriage to the late Chief Munjuku Nguvauva'. And, according to Mr Frank (in his submission) the second respondent 'was "appointed" by a group of Mbanderus to succeed the late Keharanjo'. Mr Frank submits further, 'She and a traditional councilor (first applicant) seek to intervene in the review application to oppose the relief sought by Kilus (the third respondent) and to have Aletha (the second applicant) recognized as the Chief of the Ovambanderu'. I remark in parenthesis that these two separate submissions by counsel on either side of the application speak volumes: they underline the wide schism existing within the membership of the Community.

[4] An application to intervene in an application such as the present is governed by rule 12, read with rule 6(14), of the Rules of Court. Principles and requirements have been developed by the courts in the interpretation and application of the rule and the application of the common law thereanent. Both counsel submit that the principles and requirements set out by Hannah J in *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1992 NR 316 should apply in the present proceeding. I respectfully accept the submission.

[5] Relying on authority in *Ex parte Sudurhavid* supra, Mr Hinda submits that each applicant has a direct and substantial interest in the subject matter of the litigation in the main application (that is, in the review application) which interest could be prejudiced by the judgment of the court. Counsel submits further that the 'application for intervention is made seriously and not frivolously, and the allegations made by the applicants make a prima facie case or defence.

[6] As respects the first applicant, Mr Hinda submits that 'the first applicant is a senior traditional councilor in terms of the TAA (the Traditional Authorities Act, 2000

(Act No. 25 of 2000) ('the Act')) and as such has an interest in the protection of Ovambanderu customary law and has a duty to ensure that it is upheld'. I agree; but so does every true and conscientious member of the Ovambanderu Community. The only person or entity who or which in terms of the Act stands apart from the applicant and other individual members of the Community and the Mbanderu Traditional Authority in this regard is the chief or head of the Community.

[7] The irrefragable legal position is that the authority to exercise the powers of the Ovambanderu Community is delegated, not to the members of the Community, not even the individual members of the Traditional Authority, but only to the Traditional Authority as the collective decision-making body of the Community in terms of s. 2, read with s. 3, s. 14 and s. 16, of the Act. Of course, the power maybe *expressly* – I italicize *expressly* for emphasis – subdelegated by the Traditional Authority to individual members of the Traditional Authority. This interpretation of the Act is in accord with the common law rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189, also known as the 'proper plaintiff rule'. (see *Hahlo's South African Company Law through the Cases*, JT Pretorius *et al*. (1991) pp 506 – 511, and the cases there cited). The rule applies to companies; and I do not see any good reason why it should not apply with equal force to an entity like a traditional authority in relation to the traditional community which it leads in terms of s. 3 of the Act. Thus, between the Community and the Traditional Authority there is an agency relationship, recognized by s. 2, read with s. 3, s. 14 and s. 16 of the Act, as well as by the general scheme of the Act and the purpose and functions of a traditional authority in relation to the traditional community which it leads' (s. 3 of the Act). But there is no such agency relationship between the Community and members of the Community or between the members of the community *inter se*.

[8] It is clear on the papers – and, indeed, indisputable – that the Mbanderu Traditional Authority is the second respondent in the review application, and answering affidavits have been filed on its behalf; and it has also launched a counter-application to the review application. Upon the authority of *Foss v Harbottle* supra different considerations would have arisen, in my opinion, in the first applicant's favour if the Mbanderu Traditional Authority has refused or failed – even when it has been called upon to do so by the first applicant – to answer to the review application, if the first applicant was of the opinion that the applicant by bringing the review application was acting illegally and against the legitimate interest of the Community. But that is not the situation here. As I have said previously, the Mbanderu Traditional Authority has opposed the review application, and answering affidavits have been filed in that respect. In that event, I must say the collective authoritative body established by the Act has been alive to its responsibility and has taken the appropriate action in the circumstances, particularly in respect of its functions under the Act, in particular under s. 3(1)(c) which says that it is the function of the traditional authority 'to uphold, promote, protect and preserve the culture, language, tradition and traditional values of that traditional community'. This is the very thing the first application says he wants to attain and that is why he wishes to intervene in the review application. It is not open to the applicant on his own steam and in terms of the Act to take any action about the review application by intervening therein when, as I have said more than once, the second respondent as the responsible collective, statutory and authoritative decision-making body for the Community has already taken action to oppose the review application. As I have said previously it would have been a different matter if the Traditional Authority has not taken any such action. In this regard, it is worth noting that as respects matters concerning the Community the first applicant has no power exclusive to him and independent of the Mbanderu Traditional Authority of which he is a member.

Significantly, that much Mr Hinda agrees with, as I gather from the answer he gave to the question I posed to him during the hearing.

[9] For the aforegoing reasoning and conclusions I find that in relation to the first applicant, the applicants have not established a valid basis for the application to intervene.

[10] And now to the second applicant. Mr Hinda submits, as I have said previously, that the second applicant is the designated and coronated Paramount Chief of the Ovambanderu Traditional Community ('the Community') and was duly recommended and approved as such in terms of the Ovambanderu customary law and is the reigning Queen by virtue of her marriage to the late (Chief) Munjuku Nguvauva. Counsel submitted further that a judgment by the Court in the main application (that is, the review application) will thus 'severely prejudice her in that she will be deprived of her position within the community and her social status', as aforesaid. As I have said previously, according to Mr Hinda, the second applicant, like the first applicant, has a direct and substantial interest in the subject matter of the main application and could be greatly prejudiced by a judgment of the Court in the main application. The subject matter of the main application, as Mr Frank correctly pointed out, is simply this: who should succeed the late Chief Munjuku? On that score the interest of the second applicant (like that of the first applicant) is not peculiar and exclusive to the second applicant (or the first applicant). In my opinion, all true and conscientious members of the Community have, in my opinion, a direct and substantial interest in the outcome of the review application. True and conscientious members of the Community, I think, would want, as soon as possible, to have a person take over as chief of the Community to succeed the late Chief; but all of them have not applied to intervene in the review application.

[11] It seems to me, therefore, that the second applicant's position is that, as far as she is concerned, she has a direct and substantial interest paramount to, and overriding, the interests of the rest of the Community on the basis that, as Mr Hinda submitted, she is the designated and coronated Paramount Chief of the Ovambanderu Traditional Community and was duly recommended and approved as such in terms of the Ovambanderu customary law and is the reigning Queen by virtue of her marriage to the late Munjuku Nguvauva, and the outcome of the review application 'will thus severely prejudice her in that she will be deprived of her position, within the Community and her social status'. I take it that by 'her position within the Community and her social status' Mr Hinda means her position that she is 'the designated and coronated Paramount Chief of the Ovambanderu Traditional Community and was duly recommended and approved as such in terms of the Ovambanderu customary law and is the reigning Queen by virtue of her marriage to the late Chief Munjuku Nguvauva'.

[12] I accept Mr Frank's submission that in order to succeed the applicants must establish, prima facie, that the second applicant is entitled to be the Chief of the Community and 'if this cannot be established there is no basis for the applicant's application to intervene as the basis for her to intervene is premised on this scenario'.

[13] In the applicant's own founding affidavit it is stated that Chapter 9 of the Ovambanderu Constitution sets out the procedure in terms of which the Chief of the Community must be designated. 'In summary', according to the founding affidavit, 'the Constitution provides as follows:

14.1 the Chief shall only be designated from amongst the descendants of royal blood from the Nguvauva Clan;

14.2 succession to the position of Chief shall be hereditary;

14.3 the Committee of Eminent Persons from the Nguvauva Clan shall make a recommendation as to the person to be designated as Chief;

14.4 the recommendation made by the Committee of Eminent Persons shall be endorsed by the Supreme Council and the General Assembly.'

And I signalize the critical and crucial point that all the qualifications or grounds referred to in paras 14.1–14.4 must exist together in favour of a person aspiring to be the Chief of the Community. Mr Frank submits that there is not an iota of evidence to suggest that Aletha (the second applicant) qualifies on this ground (that is the ground in para 14.1). Counsel refers to the applicants' own founding affidavit where it is stated that 'she (that is the second applicant) is the Queen of the Ovambanderu Community by virtue of the marriage to Munjuku Nguvauva the erstwhile undisputed Paramount Chief of the Ovambanderu Traditional Authority'. Nowhere in the founding affidavit is it stated that she is 'from amongst the descendants of royal blood from the Nguvauva Clan', being the first ground or qualification (in para 14.1). Mr Hinda's evidence from the Bar as respects this ground or qualification has, I find, no probative value, and so, with respect, I reject it.

[14] In any case; what about the ground or qualification in para 14.4? It has not been established that 'the recommendation made by the Committee of Eminent Persons' has been 'endorsed by the Supreme Council' as required by Chapter 8(a) of the Ovambanderu Constitution which provides that the Supreme Council shall consist of:

(i) The Paramount Chief (Chief according to Traditional Authority (sic) Act, 2000);
(ii) All Senior Traditional Councillors;
(iii) Ozondangere;
(iv) All General Marshalls of the Green Flag;
(v) Head of the Traditional Court.'

It is common cause and, indeed, indisputable, as aforesaid, that there has been no successor to the late Chief (i.e 'Paramount Chief'). That being the case, upon the authority of *Sikunda v Government of the Republic of Namibia* (3) 2001 NR 181; *Keharanjo II Nguvauva v Mbanderu Traditional Authority and Others* Case No. A312/2010 (Judgment delivered by the Court on 4 November 2010 (Unreported)) the Supreme Council had not been properly constituted and so any decision to endorse 'the recommendation made by the Committee of Eminent Persons' in terms of Chapter 9.1(b) of the Ovambanderu Constitution is invalid. Accordingly, for all the aforegoing reasoning and conclusions I find that in relation to the second applicant, too, the applicants have not established – prima facie or otherwise – a valid basis for the application to intervene.

[15] In the result I make the following orders:

The application to intervene is dismissed with costs; such costs to include costs occasioned by the employment of one instructing counsel and one instructed counsel for the hearing, and two instructed counsel for up to and excluding the hearing.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:	Adv. G Hinda
Instructed by:	Dr Weder, Kauta & Hoveka Inc.
COUNSEL ON BEHALF OF THE SECOND AND THIRD RESPONDENTS:	Adv. T Frank SC
Instructed by:	AngulaColeman