REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 254/2010

In the matter between:

KEHARANJO II NGUVAUVA **APPLICANT**

And

MINISTER OF REGIONAL AND LOCAL GOVERNMENT AND HOUSING RURAL DEVELOPMENT **FIRST RESPONDENT**

MBANDERU TRADITIONAL AUTHORITY **SECOND RESPONDENT**

KILUS NGUVAUVA **THIRD RESPONDENT**

Neutral citation: *Nguvauva v Minister of Regional and Local Government Housing* (A 254/2010) [2014] NAHCMD 290 (2 October 2014)

Coram: PARKER AJ

Heard: **18 July 2014**

Delivered: **2 October 2014**

Flynote: Administrative law – Legal duties of administrative officials and administrative bodies – The ministerial scheme of approval of proposed designation of a Chief in terms of s 5 of the Traditional Authorities Act 25 of 2000 – Court found that the Minister has discretionary power under s 5(1) of the Act to act or not as opposed to his or her obligation to act under s 5(2) of the Act – Court held that public authorities (administrative officials and administrative bodies) have many legal duties, under which they have an obligation to act, as opposed to their legal power, which give them discretion whether to act or not – Court found that after the Minister

had decided that in his discretion the two applications (of Kilus and of Keharanjo) complied with s 5(1) of the Traditional Authorities Act 25 of 2000 he had the obligation to approve their designation but for the fact that he was presented with two applications – Court found further that upon the death of Keharanjo the Minister was obliged to approve Kilus's designation as Chief of the Ovambanderu Community – Consequently, court concluded that mandamus should issue to compel the Minister to execute his *ministerium* or prescribed task under s 5(2) of Act 25 of 2000 which is to approve the designation of Kilus as the Chief of the Ovambanderu Community – On authority, court held that where an Act creates an obligation and enforces the performance in a specified manner, the court takes it to be a general rule that performance cannot be enforced in any other manner – Court held further that mandamus is an appropriate remedy in the circumstances to prevent breach of duty and injustice – Consequently, court granted the relief sought with 70 per cent of the costs because counsel of counter-applicants amended certain paragraphs relating to the relief sought during his oral submissions.

Summary: Administrative law – Legal duties of administrative officials and administrative bodies – Approval for designation as chief or head of a traditional community – Ministerial scheme and Presidential scheme under the Traditional Authorities Act 25 of 2000 – The ministerial scheme of approval of proposed designation of a Chief in terms of s 5 of Act 25 of 2000 stands apart from the Presidential scheme – Court held that the two schemes are diametrically opposed and it is an absolute imperative that the two schemes are kept strictly apart – Court found that the Minister has discretionary power under s 5(1) of the Act to act or not as opposed to his or her obligation to act under s 5(2) of the Act – Minister received two applications to approve designation of two candidates as Chief of Ovambanderu Community as successor to the deceased Chief Munjuku – Court found that the Minister decided that both applications complied with s 5(1) of Act 25 of 2000 – In order to break the tie Minister ordered the Community to go for elections in order to choose a successor to Munjuku – Before the elections could be held Keharanjo died – Court found that by that act of God the Minister had Kilus's designation only to approve under s 5(2) of Act 25 of 2000 – Court concluded that on the facts mandamus should issue to compel the Minister to execute his *ministerium* or

prescribed task which is to approve Kilus's designation – Consequently, court granted the relief sought with costs but only 70 per cent of costs of the counter-application because counsel of the counter-applicants amended certain paragraphs relating to the relief sought in the course of counsel's oral submission.

ORDER

(a) It is declared that the customary law relating to the appointment/designation of Chief of the Ovambanderu Community is as reflected in Chapter 9 of the Constitution of Ovambanderu, read with the detailed explanation set out in the affidavit of Gerson Katjirua.

(b) It is declared that the third respondent, Kilus Nguvauva, has been duly proposed to be designated as Chief of the Ovambanderu Community in terms of s 5(1) of the Traditional Authorities Act 25 of 2000.

(c) That the first respondent is ordered to approve on or before 14 October 2014 the proposed designation of the third respondent, Kilus Nguvauva, as Chief of the Ovambanderu Community in terms of s 5(2) of the Traditional Authorities Act 5 of 2000.

(d) The first respondent must pay 70 per cent only of the costs of the second and third respondents, including costs of one instructing counsel and two instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter concerns the Ovambanderu Community ('the community'), one of many traditional communities in Namibia. This Community, I should say, is not a stranger in the courtrooms of the court. The present proceeding is but the latest in a series of court cases that have come before the court in the last six or so years involving the Community. The present proceeding is about a counter-application in which Mr Frank SC, assisted by Ms Bassingthwaighte, represents the second respondent, the Mbanderu Traditional Authority and Mr Kilus Nguvauva, the third respondent. For the sake of neatness and clarity and not meaning any disrespect of these parties, I shall from now on refer to them simply as the Traditional Authority and Kilus.

[2] The present counter-application, launched on 13 December 2013, arose from a review application ('the main application') that was launched by the applicant Keharanjo II Nguvauva on 11 August 2010. For the reason given previously, I shall refer to the applicant simply as Keharanjo. In the main application the Minister of Regional and Local Government and Housing and Rural Development ('the Minister') was the first respondent, the Traditional Authority was the second respondent and Kilus was the third respondent. Before the main application could be heard Keharanjo, sadly and unfortunately, passed away on 8 April 2011; and so, the only matter to be heard is the counter-application. The Minister opposes the counter-application, and he is represented by Mr Marcus.

[3] I shall undertake a journey through that part of the history of the matter which is relevant to the present proceeding, ie the counter-application. The first signpost on the road, so to speak, has the following sorrowful legend inscribed on it: The death of Chief Munjuku II Nguvauva, Chief of the Community. For the aforementioned reasons I shall refer to the Chief simply as Munjuku. Munjuku passed away on 16 January 2008. The second signpost shows this unfortunate legend: Succession dispute. On the passing of Munjuku, an unfortunate dispute arose as to who should succeed him. Two contenders to the chieftaincy came forward. They were half-brothers Keharanjo and Kilus; both sons of Munjuku. Keharanjo was born of the marriage between Munjuku and Aletha Karikondua Nguvauva. Based on the reason given previously, I shall from now on refer to her simply as Aletha.

[4] The third signpost has a legend on it which gives the most significant direction in the determination of the present counter-application. The legend reads: Minister receives two applications for approval to make designation in respect of the same position of Chief of the Community. Shortly after his father's passing away, Keharanjo was designated as successor to the chieftaincy by a section of the Community and an application was subsequently made to the Minister for the Minister to approve the proposed designation in terms of the relevant provisions of the Traditional Authorities Act 25 of 2000 ('the Act'). His claim to succession as Chief was, however, disputed by another section of the Community which supported the succession of Kilus to the position because he was the elder of the two and because Munjuku had allegedly proclaimed that to be his wish. Thus, Kilus was also proposed to be designated as successor to the chieftaincy of the Community, and in respect of Kilus, too, an application was made to the Minister praying the Minister to approve Kilus's designation in terms of the relevant provisions of the Act.

[5] The fourth signpost has this legend inscribed on it: Mbanderu Traditional Authority petition the Minister. The Traditional Authority submitted a written petition to the Minister in terms of s 12(1) of the Act. Then on 20 January 2009 the legal representatives of Keharanjo and Senior Chief Erastus Kahuure addressed a letter to the Minister in which, among other things, they sought to 'convert our submission of the 9th December 2008 as the basis of the petition ….' In terms of s 12(2) of the Act the Minister appointed a Ministerial Investigating Committee ('the committee') to investigate the dispute. After it had conducted public hearings, the committee concluded that, according to the customary rules of succession applicable to the Community, a child born of a Chief's marriage is considered senior for purposes of succession to one born out of wedlock and that only a male child may be the 'rightful successor to his father'. The committee found that Keharanjo, who was born in wedlock, was the 'senior son' in the order of succession and recommended that he, rather than Kilus, should be recognised as the Chief of the Community. In the alternative and 'in the event that there is an objection about the senior son succeeding his father', the committee recommended that the dispute be resolved by invoking s 5(10)*(b)* of the Act 'since Government was not there to exercise

customary law on behalf of any traditional authority'. Section 5(10)*(b)* provides that, in the event of uncertainty or disagreement amongst the members of a traditional community regarding the applicable customary law, the members of the Community may by a majority vote elect, subject to the approval of the Minister, a chief or head of the community. The Minister accepted the committee's recommendation that Keharanjo should become the Chief of the Community, and the Minister made this position absolutely clear in a letter addressed to the legal practitioners of Keharanjo. This is the fifth signpost and the legend written on it is: Minister decides that Keharanjo should become successor to Munjuku.

[6] The Minister later on changed his position and went for the committee's alternative recommendation, namely that an election should be held 'for the Ovambanderu Community to choose the right successor to the late Chief Munjuku II ….' This decision was conveyed to the legal representatives of Keharanjo by a letter dated 19 May 2010. This is the sixth signpost, and the legend inscribed on it reads: Minister changes his mind and orders the Community to go for elections to choose a successor to Munjuku.

[7] The seventh signpost has inscribed on it the following legend: Keharanjo's review application. This is the main application. Aggrieved by the Minister's decision that the Community should go for elections to choose a successor to Munjuku, Keharanjo brought the review application in the court, seeking amongst other relief, an order declaring that his appointment as the Chief of the Ovambanderu Traditional Community was valid and an order reviewing, correcting and/or setting aside the Minister's subsequent decision that an election be held to determine a successor to the chieftaincy. Keharanjo contended that he should be recognised as the Chief of the Community. He cited the Minister and the Traditional Authority as first and second respondents and, since Kilus also maintained that he was the one who should be so recognised instead, he was cited accordingly in those proceedings. The Traditional Authority and Kilus opposed the main application and, simultaneously, brought the present counter-application in which they seek an order in the following terms:

‘1. That the dispute regarding the designation of Chief be referred back to the first respondent.

2. Declaring that the customary law relating to the appointment/designation of a Chief is as reflected in Chapter 9 of the Constitution of Ovambanderu, read with the detailed explanation set out in the affidavit of Gerson Katjirua.

3. Declaring that the third respondent has been duly designated as Chief of the Ovambanderu Community.

4. That the first respondent be ordered to approve the designation of the third respondent as the Chief of the Ovambanderu Community in terms of section 5 of the Traditional Authorities Act 25 of 2000 (‘the Act’).

5. Declaring the purported rule of customary law or custom relied upon by the applicant and the Ministerial Investigating Committee which discriminates against persons born out of wedlock to be in conflict with the Constitution of Namibia and that the recommendation based upon such rule or custom is invalid and unenforceable.

6. Directing that any of the respondents in the counter-application opposing it be directed to pay the costs thereof and in the event of both respondents in the counter-application opposing the relief sought, that they be directed to pay the costs jointly and severally.

7. Granting the applicants in the counter-application such further and/or alternative relief as this Honourable Court deems fit.’

I note right here that the second and third respondents no longer pursue the relief sought in para 5 of the notice of motion.

[8] At the outset, I should make this significant point. The facts appearing in the legend of each of the aforementioned signposts are undisputed: they are, indeed, in material respects as found by the Supreme Court in the judgment of Shivute CJ (Maritz JA and Mainga JA concurring) in *Kahuure v Minister of Local Government*

2013 (4) NR 932 (SC). Keeping these signposts and their legends in my mental spectacle, I proceed to the next level of the enquiry.

[9] According to the Act the designation of a chief of a community is primarily in accordance with the customary law of the community in question, and the designation is regulated by the Act. See *Kahuure*, para 20. And s 5 of the Act concerns approval to make such designation. It is supremely important to note that there are two diametrically opposed schemes of approval. The two schemes are absolutely unconnected, and they cannot be conflated, as Mr Marcus appeared to do. The first scheme relates to approval by the Minister, and the second by the President. On the fact of the instant case the Presidential scheme of approval, which is governed primarily by subsecs (1), (3), (4), (5), (6) and (7) of s 5 of the Act, does not apply in this proceeding. It is the ministerial scheme of approval that applies, and it is governed primarily by subsecs (1), (2) and (7) of the Act. It is, as I have intimated earlier, an absolute imperative that the two schemes are kept strictly apart. This reality is further buttressed by s 5(7) of the Act. Section 5(1), (2) and (7) provides:

> '5. (1) If a traditional community intends to designate a chief or head of a traditional community in terms of this Act –
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> (a) the Chief's Council or the Traditional Council of that community, as the case may be; or
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> (b) if no Chief's Council or Traditional Council for that community exists, the members of that community who are authorised thereto by the customary law of that community,
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> shall apply on the prescribed form to the Minister for approval to make such designation, and the application shall state the following particulars:
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> (i) the name of the traditional community in question;
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> (ii) the communal area inhabited by that community;
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> (iii) the estimated number of members comprising such community;

(iv) the reasons for the proposed designation;

(v) the name, office and traditional title, if any, of the candidate to be designated as chief or head of the traditional community;

(vi) the customary law applicable in that community in respect of such designation; and

(vii) such other information as may be prescribed or the Minister may require.

(2) On receipt of an application complying with subsection (1), the Minister shall, subject to subsection (3), in writing approve the proposed designation set out in such application.

(7) On receipt of any written approval granted under subsection (2) *or* (6), the Chief's Council or Traditional Council or, in a situation contemplated in subsection (1)(b), the members of the traditional community, as the case may be, shall in writing give the Minister prior notification of the date, time and place of the designation in question, whereupon the Minister or his or her representative shall attend that designation, and shall –

(a) witness the designation of the chief or head of the traditional community in question; and

(b) satisfy himself or herself that such designation is in accordance with the customary law referred to in paragraph (vi) of subsection (1).'

[Emphasis added]

[10] Doubtless, s 5(2) of the Act is critical in the determination of the instant application. Upon receiving an application to approve the designation of a chief the Minister must apply his or her mind to such application and in doing so he or she must satisfy himself or herself that the application he or she has received complies with the requirements in paragraphs (i) to (vii) of s 5(1) of the Act. I should note that

paragraph (vii) has no relevance in this proceeding: it comes into play only if the Minister has 'prescribed' or 'required' 'other information' (to use the words of the Act). There is nothing on the papers tending to show that there is some information which the Minister had 'prescribed' or 'required' in the instant matter.

[11] It follows reasonably and irrefragably that in the instant matter what the Minister had to be satisfied with when he received the applications in respect of Keharanjo and in respect of Kilus are the requirements in paras (i) to (vi) of subsec (1) of s 5 of the Act. They are what Prof Marinus Wiechers in his work *Administrative Law*, (1985) at p 137 refers to as 'prescribed objectively determinable facts'. Thus, in considering the two applications that he had received, the Minister was to be satisfied that those 'prescribed objectively determinable facts' in s 5(1)*(i)* to *(vi)* of the Act existed before deciding to act or not. That is the only discretion the Minister has in the Ministerial approval scheme under s 5(1) of the Act. As I shall demonstrate in due course, the Minister has no discretion under s 5(2) of the Act. This legal reality must not be missed. As Prof H W R Wade wrote in his work *Administrative Law*, 5th ed (1984), p 623: 'Public authorities have a great many legal duties, under which they have an obligation to act, as opposed to their legal powers, which give them discretion whether to act or not.'

[12] In the instant matter, the Minister has a legal power – discretionary power – whether to act or not in terms of s 5(1) of the Act, but he has an obligation to act – duty to act – in terms of s 5(2) of the Act. The Minister's obligation to act under s 5(2) of the Act is opposed to his legal power to act or not under s 5(1). And the two legal duties have never been conflated and taken as one in our law, as Mr Marcus appears to do.

[13] Thus, if in the opinion of the Minister, those statutorily prescribed objectively determinable facts in s 5(1) of the Act did not exist in respect of the application relating to Kilus or Keharanjo, the Minister was obliged to inform the Traditional Authority that the application of one, or both of them, as the case may be, did not comply with s 5(1) of the Act. And that would have been the end of those applications or one of them, as the case may be, as far as the Minister was concerned. But if, in

the opinion of the Minister the applications or one of them complied with s 5(1) of the Act, then, as a matter of law, the Minister was 'simply compelled to execute its (his) *ministerium* or prescribed task'. (See Marinus Wiechers, *Administrative Law*, loc. cit.) And the prescribed task is to approve the designation of Keharanjo and Kilus in terms of s 5(2) of the Act.

[14] From what I have said previously, the conclusion is inescapable that in terms of s 5(1) of the Act the Minister has a discretion in determining whether in respect of an application to approve a designation the prescribed objectively determinable facts in s 5(1) of the Act exist, that is whether the application has complied with s 5(1) of the Act. And if, in the opinion of the Minister, an application has complied with s 5(1), he has no discretion – not even a modicum of it – to decide whether he should approve a designation. As Wiechers says, the Minister 'is simply compelled to execute his *ministerium* or prescribed task'. And the prescribed task, as I have said more than once, is to approve the designation. The Minister must then simply carry out his statutory duty.

[15] The question that now arises is this: Did the Minister inform Keharanjo or Kilus – directly or indirectly – that, in his opinion, his application did not comply with s 5(1) of the Act? On the papers it is undisputed that there is nothing – nothing at all – which shows that the Minister informed the Authority (or, indeed, Keharanjo or Kilus) that the application of Kilus or Keharanjo, or both of them, did not comply with s 5(1) of the Act. The only undisputed factual finding is accordingly this: the Minister did not inform the Authority that the application of Keharanjo or Kilus, or the applications of both of them, did not comply with s 5(1) of the Act.

[16] In his answering affidavit the Minister states:

'I received two applications for approval to designate a Chief for the Mbanderu Traditional Community, one in respect of the applicant (ie Keharanjo) and one in respect of the third respondent (ie Kilus). (The third signpost) Both petitioned me in terms of Section 12 of the Act so that I could resolve the dispute that had arisen within the traditional community as to who should succeed the late Chief.' (The fourth signpost)

What the Minister did in response to the petitions was, as I have said previously, to set up a Ministerial committee to investigate the dispute and report to him. After receiving the report of the committee the Minister, in a letter dated 9 December 2009, informed Keharanjo's legal practitioners that he had decided that Keharanjo should 'become successor to the late father Nguvauva II (Munjuku)'. (The fifth signpost) What followed is the sixth signpost. The Minister changed his mind and asked the Community to go for elections to choose a successor to Munjuku.

[17] The question may be asked rhetorically; if the Minister had not decided that Keharanjo's application complied with s 5(1), how could the Minister have resolved, that is, decided that Keharanjo should become the successor to his late father Nguvauva II (Munjuku)'? And if the Minister had not decided that Kilus's application complied with s 5(1), how could the Minister have decided that the Community should go for elections in order 'to choose' between Kilus and Keharanjo, the only persons whose applications the Minister had pending before him, and who were the only two contenders, as 'the right successor to the late Chief Munjuku II'?

[18] In virtue of the aforegoing factual findings and the reasoning and conclusions, I respectfully reject the submission by Mr Marcus that the Minister has not decided that the application of Kilus and the application Keharanjo complied with s 5(1) of the Act. The Minister did decide in 2010 that both applications complied with s 5(1) of the Act. I, therefore, accept Mr Frank's submission on the point. With the greatest deference to Mr Marcus, I should say this. Having bypassed the fifth and sixth signposts, Mr Marcus was apt to miss the essentiality of the interpretation and application of s 5(1) and (2) of the Act, leading counsel to arrive at the argument he made, which, as I say, has no merit.

[19] The aforegoing reasoning and conclusions concern the Minister's exercise of discretionary power under s 5(1) of the Act and they establish the basis upon which, in my judgement, the relief sought in para 2 of the notice of motion should be granted. The next level of the enquiry concerns the Minister's obligation under s 5(2) of the Act.

[20] By 20 May 2010, the Minister had decided that the application for approval to designate Kilus and Keharanjo complied with s 5(1) of the Act. In other words, in the opinion of the Minister, the prescribed objectively determinable facts existed as respects the application of Kilus and of Keharanjo. In that event, as Prof Wiechers says, the Minister is simply compelled to execute his *ministerium* or prescribed task. The prescribed statutory task is to approve the applications in terms of s 5(2) of the Act, as I have said *ad nauseam*; and, *a fortiori*, the *ipssisima verba* of s 5(2) say so clearly and unambiguously thus: 'On receipt of an application complying with subsection (1), the Minister shall … in writing approve the proposed designation set out in such application'.

[21] All was well, as it were, in May 2010. The only fly in the ointment then was that the Minister was presented with two applications, and both of them complied with s 5(1) of the Act, as I have found previously. In the circumstances, the Minister took, in my opinion, a decision that was practical, fair and statute compliant. The Minister decided to send the Community to go for elections. And for what purpose? It was for the sole purpose of the Community choosing, between Kilus and Keharanjo, 'the right successor to the late Chief Munjuku II'. (The sixth signpost) Thus, the only candidates then were unmistakably and undoubtedly Kilus and Keharanjo. Accordingly, I should make this important point. No amount of sophistry can wash away this irrefutable factual finding and indubitable conclusion. Any other conclusion will plainly be self-serving and fallacious.

[22] Before the Minister-ordered elections could take place, Keharanjo unfortunately and sadly passed away on 8 April 2011. Doubtless, the purpose for which the Minister decided to send the Community to elections expired with the death of Keharanjo. The dispute as to who the Community should choose by ballot to succeed Munjuku also died upon the death of Keharanjo. In sum, the problem as to whose designation the Minister must approve – and I use 'must' advisedly – fizzled out upon the tragic death of Keharanjo; some would say, upon an act of God. It follows that by a sorrowful and unfortunate act of God, as at 9 April 2011, the Minister had only the designation of Kilus to approve in terms of s 5(2) of the Act. Accordingly, I accept Mr Frank's submission on the point.

[23] Flowing from all the aforegoing factual findings and reasoning and conclusions, I should signalize these important and undisputed points which, with the greatest deference to the Honourable Minister, the Minister missed, or about which, I dare say, the Minister was wrongly advised. They are the following. As far as the law is concerned, the Minister has only two pending statute compliant applications still waiting on his desk, that is, the applications relating to Kilus and Keharanjo. The latter's application, with the greatest respect to the dead, has fallen off the Minister's desk permanently. It follows inevitably and reasonably that, as I have said more than once, the Minister has only the designation of Kilus to approve in terms of s 5(2) of the Act. That is the only task the Minister must be compelled to execute; it is, in this proceeding, the Minister's *ministerium* or prescribed task, to use the words of Professor Wiechers. Thus, Kilus has acquired a right to have his designation approved. In this regard, I should say in parentheses that I take no cognizance of the intervening application involving Aletha, which, in any case failed. The intervening application has no relevance and is of no assistance on the issues under consideration in this proceeding.

[24] As I say, the Minister has a duty to execute his *ministerium* or prescribed task, which is to approve the designation of Kilus. Writing about public duties in his work *Administrative Law*, ibid., p 623, Prof H W R Wade states:

> 'Public duties
>
> As well as illegal action, by excess or abuse of power, there may be illegal inaction, by neglect of duty. Public authorities have a great many legal duties, under which they have an obligation to act, as opposed to their legal powers, which give them discretion whether to act or not.'

The Minister has an obligation to act, that is, carry out his prescribed duty under s 5(2) of the Act. As I have held previously, s 5(2) does not give the Minister legal power, which would give him the discretion whether to act or not. The Minister has a bounden obligation to act in terms of s 5(2) of the Act; and it is to approve Kilus's

designation as set out in such application (to borrow the words of s 5(2) of the Act); no more, no less. A learned judge once said:

> 'Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'

(*Doe v Bridge* (1831) 1 B & Ad. 847 at 859; per Lord Tenterden CJ (quoted in H W R Wade, ibid., p 627)

[25] In the instant case, the Minister cannot, and should not, perform his obligation under s 5(2) in any other manner. He can only approve the designation of Kilus as set out in Kilus's application, or application concerning Kilus. And for the court, the one effective remedy available to compel the Minister's performance is mandamus; a remedy used 'to prevent breach of duty and injustice'. (H W R Wade, *Administrative Law*, ibid., at 633) In sum, I hold that Kilus has succeeded in persuading this court to exercise its discretion in favour of granting mandamus. By a parity of reasoning, I hold also that Kilus has established, as I have found previously, an existing right which must be protected by declaratory order. The aforegoing reasoning and conclusions impel me to reject Mr Marcus's submission that 'there is no evidence that the Minister has considered the application for designation'. As I have demonstrated, Mr Marcus, with respect, misreads the relevant provisions of s 5 of the Act. For instance, counsel brings in s 5(6) of the Act which does not concern the Ministerial scheme of approval of designation under the Act: it concerns the Presidential scheme. I, therefore, conclude that Mr Marcus's submission cannot take the first respondent's case any further in this proceeding.

[26] I have previously held that for the reasoning and conclusions put forth, the second and third respondents are entitled to the relief sought in para 2 of the notice of motion. And I have also said that the second and third respondents do not pursue the relief sought in para 5 of the notice of motion.

[27] My next burden is to consider Mr Marcus's submission about the way some of the paragraphs relating to the relief sought have been framed. I think Mr Marcus's

submission has merit, and it should have relevance not only in respect of the substantive relief sought but also in respect of the question of costs. Mr Marcus referred particularly to paras (3) and (4). Mr Frank agreed with Mr Marcus's submission and, accordingly, applied to the court to amend paras (3) and (4). I accepted the amendments because they follow the language of s 5 of the Act. Paragraphs 3 and 4 should, therefore, then read as follows:

> '3. Declaring that the third respondent has been duly proposed to be designated as Chief of the Ovambanderu Community.
>
> 4. That the first respondent be ordered to approve the proposed designation of the third respondent as the Chief of the Ovambanderu Community in terms of s 5 of the Traditional Authorities Act 25 of 2000.'

[28] At first brush, it could be said that, may be, the first respondent opposed the application because of the way prayers (3) and (4) – the key prayers, in my opinion – were framed. But on a second thought, I should say that that may not be so because this is an issue which could have been sorted out by the parties during judicial case management meetings between the legal practitioners of the parties so as to shorten proceedings and reduce costs; but it was not done. Be that as it may, I think the making of the amendments should, in my discretion, be taken into account in the awarding of costs; for, probably, if paras (3) and (4) had been couched in the language of the amended paragraphs, the first respondent might have taken a second look at his opposition to the counter-application and might have abandoned his opposition.

[29] In the result, I hold that the law and the facts favour the granting of the counter-application; whereupon I make the following order:

> (a) It is declared that the customary law relating to the appointment/designation of Chief of the Ovambanderu Community is as reflected in Chapter 9 of the Constitution of Ovambanderu, read with the detailed explanation set out in the affidavit of Gerson Katjirua.

(b) It is declared that the third respondent, Kilus Nguvauva, has been duly proposed to be designated as Chief of the Ovambanderu Community in terms of s 5(1) of the Traditional Authorities Act 25 of 2000.

(c) That the first respondent is ordered to approve on or before 14 October 2014 the proposed designation of the third respondent, Kilus Nguvauva, as Chief of the Ovambanderu Community in terms of s 5(2) of the Traditional Authorities Act 5 of 2000.

(d) The first respondent must pay 70 per cent only of the costs of the second and third respondents, including costs of one instructing counsel and two instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT :	No appearance
FIRST RESPONDENT:	N Marcus Instructed by Government Attorney, Windhoek
SECOND AND THIRD RESPONDENTS:	T J Frank SC (assisted by N Bassingthwaighte) Instructed by AngulaColeman, Windhoek