

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
JUDGMENT

CASE NO: HC-MD-CIV-MOT-REV-2016/00331

In the matter between:

**MUTAAMBANDA KAPIKA**

**APPLICANT**

and

**MINISTER OF URBAN AND RURAL DEVELOPMENT**

**1<sup>ST</sup> RESPONDENT**

**CHAIRPERSON: COUNCIL OF TRADITIONAL LEADERS**

**2<sup>ND</sup> RESPONDENT**

**KAPIKA TRADITIONAL AUTHORITY**

**3<sup>RD</sup> RESPONDENT**

**HIKUMINUE KAPIKA**

**4<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Kapika v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2016/00331) [2018] NAHCMD 51 (9 March 2018)

**CORAM:** UEITELE J

**Heard:** 22 August 2017 & 1 October 2017

**Delivered:** 9 March 2018

***Flynote:*** Practice — Party — *Locus standi* — Citizens in constitutional State entitled to come to Court where there is legal uncertainty.

**Review** — Delay in instituting review proceedings — Whether delay was unreasonable — Appellant launching review proceedings seven months after he became aware of the decision to recognise a leader of a traditional community — the explanation given — negatives unreasonable delay.

**Constitutional law** — Article 18 — Right to fair and reasonable administrative justice — Common Law *audi alterem partem* rule.

**Summary:** The applicant instituted proceedings out of this court in terms of which he sought the review and setting aside of the first respondent's decision to designate the fourth respondent as chief of the Ombuku Traditional community in terms of the Traditional Authorities Act, 2000 (Act No. 25 of 2000).

The fourth respondent, in his opposition of the application, raised two preliminary objections, the first being that the applicant lacked *locus standi* to launch this application and the second being that the applicant unreasonably delayed in instituting the review application. The Minister also opposed the application, she based her opposition on the contention that she complied with the requirements of the Act and as such was satisfied that the fourth respondent was designated chief of the community in question.

*Held that* the Applicant in his capacity as a *bona fide* member, a *de facto* and legitimate leader of the Ombuku traditional community had the necessary standing to launch this application. Furthermore, the court held that in accordance with guidance provided by the Supreme Court, the rules of standing must not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements, as such clarity by the Applicant in these matter can only be obtained if these application is allowed.

*Held further that* the Applicant in his founding affidavit extensively explained the sequence of events that transpired during the entire seven months leading to the institution of these proceedings, that same was not denied by the fourth respondent, and as such, there has not been an unreasonable delay on the applicant's part.

*Held further that* on the documents filed of record, there was no evidence that the requirements set out in section 5 (1) of the Act were met, and secondly that the Minister also failed to establish that the jurisdictional facts required under section 12 existed for her to establish the Ministerial investigation committee that she did, and on whose report she relied on to arrive at her decision to designate the fourth respondent as chief of the Ombuku Traditional community.

*Held furthermore that* the court held that the common law *audi* rule places an obligation on public authorities and public officials to afford a person who may be affected the public authority and public official' decision an opportunity to be heard before the decision is taken. The Minister as an administrative official failed to adhere to this rule and as such, her decision was reviewed and set aside with costs.

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### ORDER

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The decision of the Minister to, in terms of section 4, 5, 8 and 12 of the Traditional Authorities Act, approve the designation of Hikemuine Kapika as chief of the Ombuku Traditional Community is set aside.

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### JUDGMENT

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UEITELE J:

#### Introduction

[1] The applicant in this matter is Mutaambanda Kapika, a member of the Ovahimba traditional community which occupy the Ombuku – Epupa area in the Kunene Region of Namibia. He is furthermore a paternal brother to the 4<sup>th</sup> respondent (Hikemuine Kapika).

The applicant alleges that during March 2014 he was elected as traditional chief of the Ombuku traditional community.

[2] The first respondent is the Minister of Urban and Rural Development, who is appointed in terms of Article 32 of the Constitution. She is also the Minister responsible for the administration of the Traditional Authorities Act, 2000<sup>1</sup> (I will, in this judgment except where the context requires otherwise, refer to the Traditional Authorities Act as the Act).

[3] The second respondent is Chief Elifas Kauluma, the chairperson of the Council of Traditional Leaders. The third respondent is the Kapika Traditional Authority. No substantive relief is sought against both the second and third respondents and they are cited simply for the interest that they may have in this matter. The fourth respondent is Hikumuine Kapika, he is the eldest son of Muniomuhoro Kapika the late Chief of the Ombuku Traditional Community.

[4] The applicant approached this Court by notice of motion seeking, amongst other relief, an order reviewing and setting aside the decision of the first respondent (I will in this judgment refer to the first respondent as the Minister) designating the fourth respondent as chief of the Ombuku traditional community.

### Background

[5] The background facts which have given rise to this application are the following. Between the years 1935 to 1982 the Ombuku Traditional Community was led by the late Chief Muniomuhoro Kapika who as I have indicted in the introductory part of this judgment is the biological father of both the applicant and the fourth respondent. Upon the death of Chief Muniomuhoro Kapika in 1982 the Ombuku traditional community, in accordance with the traditions and customs of the Ombuku traditional community

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<sup>1</sup> 25 of 2000.

nominated the fourth respondent as their Chief. The applicant served as senior councilor of the Ombuku traditional community during the period 1982 -2014.

[6] From the papers filed of record it appears that, from the time of his nomination as Chief of the Ombuku Traditional Community in 1982, the fourth respondent, has led his community with honour, was admired and respected by the community that he led. But it appears that certain events that disturbed the leadership of the fourth respondent occurred between the period 2013 to 2014.

[7] One of the events that has given rise to this application is the proposal by the Government of the Republic Namibia to construct a hydro-electric dam on the Kunene River at Epupa Falls. The Ovahimba communities that lived around Epupa Falls viewed the proposed construction of the Hydro Electric dam as a threat to the survival of their customs, culture and tradition and those communities thus vehemently opposed the construction of the Dam. The fourth respondent was at the forefront of the opposition to the construction of the dam.

[8] The applicant alleges that (the fourth respondent simply denies these allegations but does not elaborate on his denial) during August 2013 the fourth respondent has been receiving visits from three business personalities (namely a Unotjari Gerson Katjimune, Mervin Hengari and Justice Tjirimuje, I will refer to them as 'the businessmen') who are involved in the construction of dams, the aim of these visits, alleges the applicant, were to obtain the fourth respondent's support for the construction of the hydro-electric dam along the Kunene River.

[9] The applicant further alleges that after several visits by the three 'business men' the fourth respondent resolved to send a delegation consisting of traditional leaders and members of the Ombuku traditional community to China to learn about the construction of hydro-electric dams and to see those types of dams. The Chief's delegation left for China and returned to Epupa during November 2013. On their return they had to provide feedback to the Ombuku traditional community of their experience in China. On

the day that the community members who travelled to China had to provide feedback to the Community the fourth respondent just disappeared (he allegedly disappeared during January 2014) from Epupa and he remained missing for a period of approximately thirty days.

[10] The applicant furthermore alleges that he and some leaders of the Ombuku traditional community for the period of more than thirty days searched and enquired about the whereabouts of the fourth respondent until they located the fourth respondent on Farm Omuserakuumba in the Okahandja District, the farm belongs to one of the three 'businessmen'. The community members (including the applicant) visited the fourth respondent on the farm and attempted to engage him as to why he had 'abandoned' his community without him informing them of his whereabouts. The fourth respondent's alleged response was that he would only return to Epupa once he had recuperated. The community members left the fourth respondent on the farm and returned to Epupa.

[11] The fourth respondent returned to his homestead during March 2014. On his return he was guarded by approximately fifteen members of the Namibia Police and he allegedly refused to speak to any of the members of community leaders and he allegedly also refused to hold meetings and asserted that he wanted to have nothing to do with his former councilors, effectively dismissing the traditional councilors. The fourth respondent allegedly also appeared on the National Broadcaster's Television (NBC) where he indicated that he would no longer oppose the construction of the hydroelectric dam along the Kunene River.

[12] Because of the alleged refusal of the fourth respondent to engage with his senior councilors, the elders in the Ombuku traditional community during March 2014 called a public meeting at a village named Omuhonga. The meeting was allegedly attended by 625 people who included dignitaries from other traditional communities. After a debate and discussion at that meeting the community members who were present at that meeting resolved to remove the fourth respondent as the Chief of the Ombuku

traditional community. The community members furthermore resolved to elect the applicant as Chief of the Ombuku traditional community.

[13] During March 2015 the applicant, in terms of the Act, applied to the Minister for recognition as Chief of the Ombuku traditional community. Despite the applicant having applied for recognition as Chief of the Ombuku traditional community, the Minister without responding to that application, during April 2016 arranged for the inauguration of the fourth respondent as Chief of the Ombuku traditional community. I find it appropriate to pause here and observe that the applicant in his affidavit makes the allegations that the fourth respondent has, since his nomination or designation in 1982, unsuccessfully applied on more than one occasion for recognition as Chief of the Ombuku traditional community.

[14] The applicant is aggrieved by the recognition of the fourth respondent as Chief of the Ombuku traditional community. Alleging that the fourth respondent is not the legitimate chief of the Ombuku traditional community and that there was no due consideration of the customary laws and norms that regulate the succession of leadership in the Ombuku traditional community, in that the elders, the traditional councilors, and the community members of that community were not consulted in the recognition and appointment of the fourth respondent as Chief of the Ombuku traditional community, the applicant approached this Court seeking as I have indicated above an order setting aside the recognition of the fourth respondent as Chief of the Ombuku traditional community.

[15] The Minister and the fourth respondent oppose the relief sought by the applicant. The fourth respondent in his opposition to the relief sought raised two points *in limine*. The first point *in limine* relates to the applicant's capacity to institute the action it has and the second point *in limine* relates to the timeframe within which the applicant has launched its application. I therefore find it appropriate to first deal with the points *in limine* raised by the fourth respondent before I enquire into the question whether the applicant has made out a case for the relief he is seeking.

The points *in limine*

*The applicants alleged lack of capacity to institute these proceedings.*

[16] The fourth respondent attacked the applicant's capacity to institute these proceedings on the basis that the latter lacked the necessary capacity to bring this application for the following reasons:

(a) The applicant is not the chief of the Ombuku people, he is not residing in the Ombuku community and he is not a traditional leader of the Ombuku people. The applicant allegedly resided in Sesfontein which is 350 km away from Epupa.

(b) The applicant made an application to be recognized as Chief for a different community (the Muniomuhoro Kapika Traditional Authority) than the community (the Kapika Traditional Authority) for which the fourth respondent was designated as Chief. There is allegedly no direct relationship between the applicant's application and the fourth respondent's application to be designated as Chief of the Okapika Traditional Authority.

[17] AT the hearing of this matter Ms Malambo- Ilunga who appeared on behalf of the Minister relied on the cases of *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*<sup>2</sup>; *Reddy v Decro Investment CC t/a Cars for Africa and Others*<sup>3</sup> ; and *Njagna Conservancy Committee v The Minister of Lands and Resettlement*<sup>4</sup> to advance the argument that the applicant has no *locus standi* to institute these proceedings.

[18] I will, before I deal with the legal principles relating to *locus standi*, deal with some factual issues. The fourth respondent contends that the applicant is not a

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<sup>2</sup> 2000 NR 1 HC.

<sup>3</sup> 2004 (1) SA 618 (D) at 623 B-625 B.

<sup>4</sup> ( A 276-2013) [2016] NAHCMD 250 (18 August 2016) para 41.



traditional leader of the Ombuku traditional community because he does not live or reside within the Ombuku traditional community. I cannot accept this allegation by the fourth respondent because the applicant in his founding affidavit makes the allegation that he has for period of approximately fifteen years served as a senior traditional councilor on the fourth respondent's Chief's Council.

[19] The applicant in his replying affidavit furthermore explains that he has a cattle post situated in Sesfontein which he often visited even during his tenure as senior councilor on the fourth respondent's Chiefs' Council. The applicant further explains that he currently resides at Omuhonga village to where he moved as a result of the drought and that his lifestyle is nomadic in nature.

[20] The fourth respondent does not deal with the allegation by the applicant in his founding affidavit that he has been a senior councilor on the fourth Respondent's Chiefs' Council for a period of approximately fifteen years. Neither does he dispute or contradict it. The fourth respondent by electing not to answer the allegation, made by the applicant in his founding affidavit, in his answering affidavit, it follows that the facts raised in applicant's founding affidavit were not placed in dispute and should be accepted.<sup>5</sup> I therefore reject the contention that the applicant is not a traditional leader of the Ombuku community.

[21] I now return to deal with the legal principles relating to the *locus standi* of a person to institute legal proceedings. In the matter of *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*<sup>6</sup> this court accepted the common law principle that a litigant must have a direct and substantial interest in the outcome of legal proceedings. Devenish<sup>7</sup> explains this requirement as follows:

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<sup>5</sup> See the case of *O'Linn v Minister of Agriculture, Water and Forestry* 2008 (2) NR 792 (HC) at 795.

<sup>6</sup> 2000 NR 1 (HC).

<sup>7</sup> Devenish G E, Govender K, Hulme D *Administrative Law and Justice in South Africa.*, LexisNexis, 2001 at p 455

'This [the requirement that a litigant must have legal interest] requires that a litigant should both *be endowed with the necessary capacity to sue, and have a legally recognized interests in the relevant action to seek relief.*' (Underlined for emphasis)

[22] In the matter of *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*<sup>8</sup> the Supreme Court held that in a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights. The rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements.

[23] The applicant makes the averment that he brings the application in his capacity as a *bona fide* member of the Ombuku traditional community and as the *de facto* and legitimate leader of the Ombuku community.

[24] The designation of a chief or head of a traditional community is not exclusively a customary law issue. The process of designating a traditional leader is also regulated by the Act. The word 'chief' is defined in s 1 of the Act as meaning 'the supreme traditional leader of a traditional community designated in accordance with s 4(1)(a) and recognised as such under s 6' of the Act. The following definition of 'head' is given in the same section: "*head*" in relation to a traditional community, means the supreme traditional leader of that traditional community designated in accordance with s 4(1)(a) or (b), as the case may be, and recognised as such under s 6. 'Designation' is defined as follows:

'designation' in relation to the institution of a chief or head of a traditional community, includes the election or hereditary succession to the office of a chief or head of a traditional community, and any other method of instituting a chief or head of a traditional community recognised under customary law'.

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<sup>8</sup> 2011 (2) NR 726 (SC) at 733.

[25] In this matter the applicant alleges that he was designated as Chief of the Ombuku traditional Community in accordance with the Ovahimba traditional practices and that the fourth respondent was also removed as Chief of that community in accordance with the Ovahimba customary law and traditional practice. If the applicant is correct, and his designation and the removal of the fourth respondent is in accordance with the Ombuku traditional community's custom and tradition, then he would have successfully vindicated his rights. If he is incorrect, he will have obtained clarity on his legal entitlements. I therefore follow the guidance by the Supreme Court that the rules of standing must not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements. I conclude, therefore, that the applicant does have a standing to launch these proceedings.

*Unreasonable delay.*

[26] In his founding affidavit the applicant states that he has been advised that an application such as the one he has lodged must be brought to court without delay. The applicant admits that he became aware of the fourth respondent's recognition (by the Minister as Chief of Ombuku traditional community) during April 2016 yet the applicant only launched these proceedings during October 2016, which is after a period of approximately six months.

[27] The legal principles governing the period within which to institute review proceedings have been considered in many cases before this court. In the matter of *Disposable Medical Products*<sup>9</sup> which involved the awarding of tenders, the court refused to condone the delay of 3 months before instituting review proceedings in respect of one of the tenderers. In *Kruger v Transnamib*<sup>10</sup> a lapse of two and a half years was held to be unreasonable. In the *Christophine Paulus*<sup>11</sup> case a lapse of 9 months was held to be unreasonable. In the *Purity Manganese* case,<sup>12</sup> the delay was between 5 months and 10

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<sup>9</sup> *Disposal Medical Products (Pty) Ltd v Tender Board of Namibia and others* 1997 NR 174 (HC).

<sup>10</sup> 1995 NR 84 (HC).

<sup>11</sup> *Christophine Paulus and 3 Others v Swapo Party and 7 Others* unreported Judgment per Swanepoel AJ A144/2007 delivered on 13 November 2008.

<sup>12</sup> *Purity Manganese (Pty) Ltd v Minister of Mines and Energy and Others* 2009 (1) NR 217 (HC).

months respectively for different decisions and was also held to be unreasonable delay, and in the matter of *Orgbokor and Another v The Immigration Selection Board & others*<sup>13</sup>, the court refused to condone a seven months delay in launching a review application.

[28] In the matter *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*<sup>14</sup>, the Supreme Court stated that because no specific time is prescribed for the institution of review proceedings, the Courts, as part of their inherent power to regulate their own procedure, have laid down that a review must be brought within a reasonable time. The Court went on to remark that where the point is raised that there has been unreasonable delay the Court must first determine whether the delay was unreasonable. This is a factual inquiry depending on the circumstances of each case. Once it is satisfied that the delay was unreasonable the Court must determine whether it should condone the delay said Justice Strydom.

[29] In essence, a court is to engage in two enquiries. The first is an objective one and is whether the delay was on the facts unreasonable. The second is whether the delay should be condoned. The first enquiry is a factual one and does not involve the exercise of a discretion.<sup>15</sup> It entails a factual finding and a value judgment based upon those facts. The second enquiry involves the exercise of a discretion. The approach adopted in the *Namibia Grape Growers and Exporters Association and Others* was followed by the Supreme Court in the matter of *Keya v Chief of the Defence Force and Others*<sup>16</sup> and reaffirmed in the recent matter of *South African Poultry Association & 5 Others v The Minister of Trade and Industry and 3 Others*<sup>17</sup>

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<sup>13</sup> Unreported Judgment of 2012.

<sup>14</sup> 2004 NR 194 (SC).

<sup>15</sup> *Keya* 2013 (3) NR 770 (SC) paras 21-22.

<sup>16</sup> *Ibid.*

<sup>17</sup> An as yet unreported judgment of the Supreme Court Case No: SA 37/2016 delivered on 17 January 2018.

[30] In this matter the applicant sets out the circumstances of the case. The circumstances of this case are in summary that the he is person who has received no formal education at all, he does not speak or read the English language. The area in which he lives does not possess of the modern communication technology. Other logistical problems related to the fact that even when the recognition of the fourth respondent came to his attention, he had to engage through third parties to communicate with his legal practitioners and the geographical distance between him and his legal practitioners made communication a challenge.

[31] In my view, the applicant has extensively explained the sequence of events that transpired during the entire seven months period in his founding affidavit as stated above. The fourth respondent, does not deny same and has tendered no convincing explanation of the alleged prejudice. I am satisfied the delay of period of six months to institute proceedings in the circumstances of this case is not unreasonable delay. Even if I am wrong and the delay was unreasonable I am satisfied that the explanation given by the applicant is detailed and thorough, I will therefore condone the delay in instituting the proceedings. Having disposed of the two points *in limine* I will now proceed to consider the grounds on which the applicant seek to have the decision of the Minister reviewed.

Is the Minister's decision to recognise the fourth respondent lawful?

[32] The applicant seeks to have the Minister's decision to recognise the fourth respondent reviewed and set aside on the basis that that decision was taken in contravention of Article 18 of the Namibian Constitution. In particular the applicant alleges that the Minister could not, on the evidence available to her have been satisfied that the requirements set out for the recognition of a person as Chief of a traditional authority were satisfied in the case of the fourth respondent. The applicant further alleges that the Minister acted *ultra vires* s 12 of the Act, and did not afford him a hearing as required under Article 18.

[33] The Minister on the other hand opposes the application on the basis that the fourth respondents application met all the requirements set out in s 4 of the Act and that s 5 of Act does, in circumstances where the requirements set out in s 4 have been complied with by an applicant, compel her to recognise the designation of an applicant.

[34] In view of the contentions by the parties I find it appropriate to first set out the legal scheme relating to the designation and recognition of a traditional chief under the Act. The requirements which traditional authorities and the Minister must comply with in the process of designating and approving the designation of a person as a chief of a traditional community are set out in the Act. The relevant provisions are set out in sections 4, 5, 6, 8 and 12 of that Act.

[35] The first step that must be taken to designate a member of a traditional community as chief of that community is that, members of that traditional community who are authorised thereto by the customary law of that community, may designate in accordance with that law (i.e. the customary law of that community) one person from the royal family of that traditional community or if that community does not have a royal family, any member of that traditional community, who will be instituted as the chief of that traditional community<sup>18</sup>. The qualifications for designation and the tenure of, removal from and succession to the office of chief a traditional community will be regulated by the customary law of the traditional community in respect of which such chief is designated.<sup>19</sup>

[36] After the members of a traditional community who are authorised thereto by the customary law of that community have designated a person from the royal family of that traditional community or a member of that traditional community as the person who is to be instituted as chief of that traditional community, the Chief's Council of the Traditional Authority or if there is no Chief's Council or Traditional Council for that community, the members of that community who are authorised thereto by the customary law in respect of that traditional community must, in the prescribed form, apply to the Minister for

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<sup>18</sup> See section 4(1) of the Traditional Authorities Act, 2000.

<sup>19</sup> See section 4(2) of the Traditional Authorities Act, 2000.

approval to make such designation<sup>20</sup>. The application form must state the following information:

- (a) the name of the traditional community in question;
- (b) the communal area inhabited by that community;
- (c) the estimated number of members comprising such community;
- (d) the reasons for the proposed designation;
- (e) the name, office and traditional title, if any, of the candidate to be designated as chief or head of the traditional community;
- (f) the customary law applicable in that community in respect of such designation; and
- (g) such other information as may be prescribed or the Minister may require.

[37] On receipt of an application as contemplated in s 5(1) of the Act and if the application *complies* with subsection (1) of s 5, the Minister must, in writing, approve the proposed designation set out in such application. Section 5(3) set out the circumstances under which the Minister may, despite the fact that the requirements of s 5(1) have been met not approve the designation of an applicant. With this brief set out of the legal scheme for the designation and recognition of a traditional chief under the Act, I proceed to evaluate whether the process that led to the Minister approving the designation of the fourth respondent as chief of the Ombuku traditional community complied with the requirements set out in the Act. (Italicized and underlined for emphasis).

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<sup>20</sup> See section 5(1) of the Traditional Authorities Act, 2000.

[38] The facts that are not in dispute are that the Ombuku traditional community was until his demise in 1982 led by Muniomuhoro Kapika as the supreme traditional leader of that traditional community. It is also not in dispute that since the coming into operation of the now repealed Traditional Authorities Act, 1995 (Act 17 of 1995), the repealed Traditional Authorities Amendment Act, 1997 (Act 8 of 1997), and the Traditional Authorities Act, 2000 no person was recognised as Chief of the Ombuku traditional community. It is further common cause that the fourth respondent was designated by the Ombuku traditional community to succeed his late father, Muniomuhoro Kapika, as the supreme traditional leader of that traditional community, but his applications for recognition during 1997 and 2001 were unsuccessful, meaning that until July 2016 the Ombuku traditional community had no *de jure* chief.

[39] During May 2014 a certain Peihamaa Tjindunda, who described himself or herself as a 'Traditional Councilor' submitted an application to the Minister for recognition and designation of the fourth respondent as chief of the Ombuku traditional community. A year later, that is, during May 2015 a certain Uemupiana Kapika, who described himself or herself simply as the 'Secretary' also submitted an application to the Minister for recognition and designation of the applicant as chief of the Ombuku - Epupa traditional community.

[40] The application that was submitted for the recognition and designation of the fourth respondent as chief of the Ombuku traditional community did as required under s 5(1) of the Act:

- (a) Set out the name of the traditional community in question as the, Ombuku traditional community;
- (b) Set out the communal area inhabited by that community as the Villages consisting of Omuramba, Epupa, Orokaune, Omuhonga, Okanguati, Enjandi, Omuangati and Onungurura.
- (c) Set out the estimated number of members comprising such community as 6000;



- (d) Set out the reason for the proposed designation the fact that there is no recognised traditional leader in the area of Ombuku ;
- (e) Set out the name of the person proposed for designation as Hikemuine Kapika, the office and traditional title as 'Ombara'.
- (f) States that customary law applicable in that community in respect of such designation is that succession is through paternity line.
- (g) such other information as may be prescribed or the Minister may require

[41] The difficulty that I have in accepting the Minister's contention that the fourth respondent's application met the requirements of the Act is this. Section 5(1) of the Act provides that if a traditional community intends to designate a chief or head of a traditional community in terms of the Act, the Chief's Council or the Traditional Council of that community, if there is no Chief's Council or Traditional Council for that community , the members of that community who are authorised thereto by the customary law of that community must apply on the prescribed form to the Minister for approval to designate a candidate as chief or head of a traditional community. It is common cause that the application was not made by the Chief's council or Traditional council. There is also no allegation that Peihamaa Tjindunda who submitted the application on behalf of the fourth respondent is authorised by the customary law of the Ombuku traditional community to designate the fourth respondent as Chief or head of the Ombuku traditional community.

[42] The second difficulty that I have is that s 4 of the Act requires the designation of a person as chief or head of a given traditional community to be in accordance with the customary laws of that given traditional community. The application submitted on behalf of the fourth respondent simply states that '*succession is through paternity line*'. What that means remains a misery to me. Objectively viewed the Minister could not on the

information that '*succession is through the paternity line*' be satisfied that the designation of the fourth respondent was in accordance with the customary laws of the Ombuku traditional community.

[43] The Minister in her answering affidavit argues that she is not authorized in terms of the law to consider an application for designation when there is already a sitting Chief and where no notice of removal of such sitting Chief has been made to her office. I do not see significance of this argument by the Minister for the simple reason that on the evidence placed before me the application seeking the designation of the applicant was submitted to the Minister already in May 2015 and the decision to recognise the fourth respondent was only taken in April 2016 and his designation gazetted in June 2016. It thus follows that at the time when the Minister received the applicant's application for designation there was no 'siting Chief'.

[44]. The Minister in her answering affidavit further contends that in making her decision, she gave due consideration and took into account the customary laws and norms that regulate the succession of leadership in the Ombuku community. In support of that contention the Minister referred me to a report of a Ministerial Investigation Committee she established during March 2015.

[45] The Ministerial investigation committee in its report on the Ombuku traditional authority customary law reported as follows:

### **'3.3 Standing Customary law**

The members related that their reason to support Kapika's chieftaincy is because he is born out of the Kapika Royal family and his forefathers were Chiefs (ozombara). It was uttered that leadership in terms of their customary law is hereditary and the chieftainship succession follows the paternal line. It was further asserted that they strictly follow their customary norms and values when it comes to succession as they are afraid to be cursed by heir ancestors if they deviate from their cultural norms and values. On the other hand they are also committed to preserve their Customary Law.

They further maintained that Kapika's last wish is to leave a legacy in the area of socio – economic development for his community. They further substantiated their support for Kapika's vision as he promised to be a cooperative partner with the Government in development for the sake of his future generation.

They pleaded with Government to bury their past differences of not being cooperative with the Government and further promised to join hands with it in any area of development...

### **3.6 Customary Law applicable in the in the designation of a Chief**

The investigation committee was informed in terms of their customary law applicable in designating a chief, leadership in the Himba line is *Oruzu* (paternal) Muniomuhoro Kapika was the father of Hikumuine Kapika so the successions is inherited paternally from the father side.

Ombara Mukupatjirongo Tjiuiju (*Omukuendata* –maternal line) was not having a son that is why his sister's son Kahengombe Kapika (*Omukuendata*) succeeded him as Chief. No matter where succession derives from, the maternal line of *Ovakuendata* is the appointing authority of the succeeding chief.'

[46] Apart from the fact that the Minister has failed to establish that the jurisdictional facts required under s12 of the Act existed for the establishment of the Ministerial investigation committee, the report by the committee leaves a lot of questions unanswered. It does not reveal who the 100 persons who were consulted by the committee are, it does not reveal the qualifications of those 100 persons in terms of the knowledge of the Ombuku traditional customary law. The report furthermore does not clarify the customary law as to how a Chief is designated. I am thus of the view that the reliance by the Minister on the Ministerial investigation committee could still not satisfy her that the designation of the fourth respondent is in accordance with Ombuku traditional community's customary laws.

[47] The third difficulty that I have is that the Minister received two separate applications, one in April/May 2014 and one May 2015 for the designation of two different persons as traditional Chiefs for the same Ombuku traditional community and without her having heard the applicant decided to recognise one of the applicants (in this case the fourth respondent) as the designated Chief.

[48] The Minister derives her power to designate a person as chief from the Act. It is trite law that the Minister is an administrative official and as such, is subject to the provisions of Art 18 of the Namibian Constitution. It thus follows that when the Minister designates a chief in terms of the Act, she is performing an administration function and the standards and norms upon which such conduct is weight up are set out in the Constitution, which is the supreme law of the land. The common law, *audi* rule, places an obligation on public authorities and public officials to afford a person who may be affected the public authority and public official' decision an opportunity to be heard before the decision is taken.<sup>21</sup>

[49] In the case of *Zondi v MEC for Traditional and Local Government Affairs*,<sup>22</sup> Ngcobo J held that *audi alterem partem* rule requires a notice to be send before an adverse decision is made, this he asserts, is a fundamental requirement of fairness. This notice provides the person affected with the opportunity to make a representation. This he held, is a fundamental element of fairness. There is no dispute in this matter that the Minister is expected to act fairly and reasonably and to comply with common law requirements. Applying the above position taken by Ngcobo J in the *Zondi* case, it cannot be said that the Minister acted reasonably and fairly in terms of the common law, if she did not afford the applicant an opportunity to be heard before she made the decision to recognise the designation of the fourth respondent. The failure by the Minister to hear the applicant is in my view fatal, and the decision by the minister to recognise the designation of the fourth respondent cannot be allowed to stand.

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<sup>21</sup> *SA Roads Board v JHB City Council* (1991) AD.

<sup>22</sup> 2005 (3) SA 589 (CC) (CCT Case No: 73/03).

[50] In the result I make the following order:

The decision of the Minister to, in terms of section 4, 5, 8 and 12 of the Traditional Authorities Act, 2000 approve the designation of Hikumuine Kapika as chief of the Ombuku Traditional Community is reviewed and set aside.

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Ueitele J

Judge

## APPEARANCES

APPLICANT: W Odendaal  
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