



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

In the matter between:

Case no: HC-MD-CIV-MOT-REV-2017/00199

<b>RUDOLF NGONDO</b>	<b>FIRST APPLICANT</b>
<b>SEVERINUS SITEKETA</b>	<b>SECOND APPLICANT</b>
<b>SIUETELE ELIAS JAPIE PHILLIPUS</b>	<b>THIRD APPLICANT</b>
<b>ANDREIES MUPOROSI KAMUKWANYAMA</b>	<b>FOURTH APPLICANT</b>
<b>HAWINA RENATE SIREMO</b>	<b>FIFTH APPLICANT</b>
<b>PUIS KANDJIMI</b>	<b>SIXTH APPLICANT</b>
<b>STEFANUS HAUFIKU MUKUYA</b>	<b>SEVENTH APPLICANT</b>
<b>MAGNUS SITEKETA MPASI</b>	<b>EIGHTH APPLICANT</b>
<b>AMNDUS KAVERA MUHWA</b>	<b>NINETH APPLICANT</b>
<b>ADAM KABONO</b>	<b>TENTH APPLICANT</b>
<b>SABINA NZOWO</b>	<b>ELLEVENTH APPLICANT</b>
<b>KAMUNDIRO BETHILIE NDAHEPA</b>	<b>TWELVETH APPLICANT</b>
<b>HIMARWA PETRUS KANDJIMI</b>	<b>THIRTEENTH APPLICANT</b>
<b>JOSEPH NZOWO</b>	<b>FOURTEENTH APPLICANT</b>
<b>EINO SIVANDA</b>	<b>FIFTEENTH APPLICANT</b>
<b>ALIPIA MBAVA HIMARWA</b>	<b>SIXTEENTH APPLICANT</b>
<b>KRISTINE MUDI HAUSIKU</b>	<b>SEVENTEENTH APPLICANT</b>
<b>CECILIA NANKALI NDARA</b>	<b>EIGHTEENTH APPLICANT</b>
<b>LEEVI SIRONGO NDARA</b>	<b>NINTEENTH APPLICANT</b>
<b>MARKUS KATANGA</b>	<b>TWENTIETH APPLICANT</b>
<b>REINHOLDA MBWARE</b>	<b>TWENTY FIRST APPLICANT</b>

**KATRINA RUKUSU MUTANGARA  
BENHARD HAIMBANGA MUKUVE**

**TWENTY SECOND APPLICANT  
TWENTY THIRD APPLICANT**

and

**THE MINISTER OF URBAN AND RURAL  
DEVELOPMENT**

**FIRST RESPONDENT**

**THE UUKWANGALI TRADITIONAL AUTHORITY**

**SECOND RESPONDENT**

**EUGENE SIWOMBE KUDUMO**

**THIRD RESPONDENT**

**THE PRESIDENT OF THE REPUBLIC OF NAMIBIA**

**FOURTH RESPONDENT**

**THE GOVERNOR OF THE KAVANGO WEST REGION**

**FIFTH RESPONDENT**

**Neutral citation:** *Ngondo v The Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2017/00199) [2019] NAHCMD 158 (06 March 2019)

**Coram:** GEIER J

**Heard:** 19 February 2019 & 6 March 2019

**Delivered:** 06 March 2019

**Released on:** 21 May 2019

**Flynote:** Customary law – Traditional authority – Traditional Authorities Act 25 of 2000, ss 2 to 6 prescribe the mechanisms that are to be followed for a valid designation of a chief or traditional leader to occur if a traditional community intends having a chief or head of a traditional community to be designed in terms of the Act. – Traditional authority *in casu* not applying for the designation of the third respondent as chief in the prescribed manner – Court holding that were the pre-conditions for a valid designation process - set by the governing statute, had been not complied with - such non-compliance fundamentally flawed the decision of Minister to recognize the designation of the third respondent as chief – Minister’s decision set aside.

**Summary:** The applicants sought an order for the review and setting aside of the minister's second decision to designate the third respondent as chief of the Uukwangali Traditional Community after the third respondent's first designation had been reviewed and set aside and declared invalid by the High Court. The minister – after receiving erroneous advice that the court order which had reviewed and set aside the first designation no longer posed an impediment for the third respondents designation – simply went ahead – and thus for a second time – designated the third respondent as chief again. This second designation thus occurred in circumstances where the procedures set by the Traditional Authorities Act 25 of 2000 for the designation of a chief to occur had not been followed.

Held, that sections 2 to 6 and possibly 12 of the Traditional Authority's Act have to be complied with for a valid designation of a chief or traditional leader to occur if a traditional community intends designating a chief or head of a traditional community in terms of the Act.

Held, that the second purported designation, of the third respondent, by first respondent, as made on 15 February 2017, could not be sustained in circumstances where the pre-conditions for a valid designation process, set by the governing statute, had been not complied with - which non-compliance thus fundamentally flawed the second decision of the first respondent, as made on 15 February 2017, and which culminated in the consequent recognition of the third respondents designation by proclamation in the Gazette. Review accordingly upheld and the Minister's decision reviewed and set aside.

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## ORDER

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1. The second decision of the first respondent, as made on 15 February 2017, to designate the third respondent as the Chief of the Uukwangali Traditional Community and the Uukwangali Traditional Authority is hereby reviewed and set aside, and such designation is declared as invalid and of no force or effect.

2. The first, second and third respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
3. The case is regarded as finalised.

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## JUDGMENT

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GEIER J:

[1] The applicants seek to set aside the third respondent's designation, as Chief of the Uukwangali Traditional Community, by the first respondent, the Minister of Urban and Rural Development and Housing.

[2] The respondents have opposed the application tooth and nail.

[3] Although lengthy heads of argument were filed on behalf of all parties, I believe that the dispute lends itself towards a fairly simple resolution. The basis for such resolution becomes immediately apparent upon a consideration of the case history, which has also been conveniently set out in applicant's counsel's principal heads of argument. He did so as follows:

'2. The common facts are as follows:

2.1 The previous Chief of the Uukwangali Traditional Authority passed away on 17 December 2014.<sup>1</sup>

2.2 After his death, a dispute arose in the community as to whom should be designated as the new Chief. Some members of the community designated Mr Kudumo,<sup>2</sup> whilst others opposed such designation. The Second Applicant made an application that his designation be approved. A petition was addressed to the Minister,<sup>3</sup> and the Minister confirmed in writing that she appointed an Investigation Committee under section 12 of the Traditional Authorities Act, and that she has not approved the designation of Mr Kudumo as the Chief of

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<sup>1</sup> Paragraph 33 of the Applicants' founding affidavit.

<sup>2</sup> Paragraph 34 of the Applicants' founding affidavit.

<sup>3</sup> Paragraph 35 of the Applicants' founding affidavit.

the Uukwangali Traditional Authority.<sup>4</sup>

2.3 Despite the appointment of the Investigation Committee, and whilst the Investigation Committee was about to commence with its work,<sup>5</sup> the Minister designated the Third Respondent (“Mr Kudumo”) as the Chief of the Uukwangali Traditional Authority on 25 April 2015.<sup>6</sup>

2.4 Some of the Applicants in the instant application then launched an application to review and set aside that decision to designate Mr Kudumo as the Chief of the Uukwangali Traditional Authority.<sup>7</sup>

2.5 That application was opposed by the First, Second and Third Respondents, but the application was settled on the basis that the opposition was withdrawn, and the Applicants then obtained the orders sought on an unopposed basis on 19 October 2016.<sup>8</sup> Accordingly, and in terms of the Court Order by Angula, DJP, the designation of Mr Kudumo as the Chief of the Uukwangali Traditional Authority was set aside and of no force or effect.

2.6 Mr Kudumo and the Uukwangali Traditional Authority did not oppose that initial application, but they launched an urgent application for the stay of the Court Order of Angula, DJP, pending the rescission of that order.<sup>9</sup> The stay application was struck for lack of urgency, with costs, and the rescission application was ultimately withdrawn, with costs, during oral arguments on the day it was heard.<sup>10</sup>

2.7 In the interim the Minister called a meeting with the First Applicant. The invitation to the meeting was stated as:<sup>11</sup>

**“Mr. Rudolf Ngondo  
P O Box 29  
RUNDU**

<sup>4</sup> Paragraphs 38 and 39 of the Applicants’ founding affidavit.

<sup>5</sup> The purported inauguration of Mr Kudumo was scheduled before the date on which the Investigation Committee would meet with one section of the community – see paragraph 44 of the Applicants’ founding affidavit.

<sup>6</sup> Paragraph 42 of the Applicants’ founding affidavit.

<sup>7</sup> Paragraph 56 of the Applicants’ founding affidavit. See also annexure “**K.3**” to the founding affidavit (which is a copy of the first application under Case Number: A55/2016).

<sup>8</sup> A copy of the Court Order of 19 October 2016 is attached to the founding affidavit as annexure “**K.2**”.

<sup>9</sup> Paragraph 59 of the Applicants’ founding affidavit.

<sup>10</sup> Paragraph 59 of the Applicants’ founding affidavit.

<sup>11</sup> See annexure “**SM.1**” to the replying affidavit of the Seventh Applicant (Stefanus Hausiku Mukuya).

Dear Mr. Ngondo,

**INVITATION TO A MEETING WITH THE MINISTER**

This letter serves to invite you to a meeting with the Minister, scheduled to take place at our Ministry on 15<sup>th</sup> February 2017 at 10h00, 3<sup>rd</sup> floor, Minister's Board Room – Windhoek.

The meeting will tackle the Court Order of 19 October 2016 that set aside the designation of Mr. Eugene Siwombe Kudumo as the Chief of the Uukwangali Traditional Authority and to look into the way forward.

Your confirmation to attend this meeting will be highly appreciated.

Yours sincerely

**Sophia Shaningwa (MP)**

**MINISTER"**

2.8 The First Applicant stated that he understood that the purpose of the meeting was "...to discuss what processes and procedures ought to be followed in order to lawfully nominated, designate and appoint a Chief of the Uukwangali Traditional Authority, considering the previous process was flawed and set aside by a Court Order."<sup>12</sup> The minutes of the meeting of 15 February 2017 confirms this:

"2.3 Purpose of the meeting

The Minister further explained the purpose of the meeting to which she stated that the meeting was called in compliance with the Government Attorneys' advice, that the Minister should meet with both parties to discuss the High Court Order of the 19<sup>th</sup> October 2016 which set aside the designation of Mr. Eugene Siwombe Kudumo as Chief of Ukwangali Traditional Authority and thereafter craft together the way forward after the deliberations."

2.9 The Second Applicant was not invited to the meeting, although he sought to be designated as the Chief of the Uukwangali Traditional Authority.<sup>13</sup> He nonetheless attended the meeting. Interestingly, the agenda for the meeting (disclosed in the record of the

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<sup>12</sup> See paragraph 61 of the Applicants' founding affidavit.

<sup>13</sup> Paragraphs 64 and 65 of the Applicants' founding affidavit.

decision), the Applicants' legal practitioner was allocated a timeslot to make remarks under item 2.5, although he was not invited to the meeting.

2.10 At the meeting, the Second Applicant sought to make representations to the Minister, but the Minister repeatedly refused to hear him.<sup>14</sup> This is not denied by the Minister in her answering affidavit.<sup>15</sup>

2.11 The Minister then again designated Mr Kudumo as the Chief of the Uukwangali Traditional Authority.<sup>16</sup> The Minister asserts that she based her decision on the report of the Investigation Committee.

2.12 After the 15 February 2017 meeting called by the Minister, the Applicants' legal practitioner addressed several letters to the Minister, seeking clarity and information concerning the (second) designation of Mr Kudumo as the Chief of the Uukwangali Traditional Authority. These letters – of 17 February 2017,<sup>17</sup> 24 February 2017,<sup>18</sup> 3 March 2017<sup>19</sup> and 23 March 2017<sup>20</sup> – all went unanswered by the Minister or her officials, despite threats of litigation.

2.13 The Minister explains in her answering affidavit why she ignored the letters of the Applicants' legal practitioner:

**“As a matter of practice, letters of this nature are answered by the Office of the Government Attorney. I am advised and submit that the writer of these letters is a senior Legal Practitioner of this Honourable Court and is aware of this practice. This is the reason why I did not comment on the aforesaid letters.”<sup>21 22</sup>**

2.14 At the hearing of Mr Kudumo's application to rescind the Court Order of Angula, DJP (which was on 24 March 2017), the point was raised that the application to rescind the order was academic on account of the new designation of Mr Kudumo as the Chief of the

<sup>14</sup> Paragraph 65 of the Applicants' founding affidavit.

<sup>15</sup> Paragraphs 39 and 40 of the Minister's answering affidavit.

<sup>16</sup> See paragraph 67 of the Applicants' founding affidavit, and the Minister's answer to that at paragraph 41 of her answering affidavit.

<sup>17</sup> Annexure “O.1” to the Applicants' founding affidavit.

<sup>18</sup> Annexure “O.2” to the Applicants' founding affidavit.

<sup>19</sup> Annexure “O.3” to the Applicants' founding affidavit.

<sup>20</sup> Annexure “O.4” to the Applicants' founding affidavit.

<sup>21</sup> See paragraph 42 of the Minister's answering affidavit.

<sup>22</sup> This stance is inconsistent with a previous instance where the Minister promptly replied (annexure “D” to the Applicants' founding affidavit) to a letter from the Applicants' legal practitioner (annexure “C” to the Applicants' founding affidavit).

Uukwangali Traditional Authority. Mr Kudumo's legal practitioner and the legal practitioner acting for the Minister were unaware of the new designation of Mr Kudumo.<sup>23</sup> One must also assume that Mr Kudumo was not aware of it either.

2.15 That application (i.e. rescission application) was then postponed to 5 April 2017 for the Minister to inform the Court whether or not Mr Kudumo was indeed so designated. On 4 April 2017, the Minister filed an affidavit<sup>24</sup> wherein she confirmed that she approved the designation of Mr Kudumo as the Chief of the Uukwangali Traditional Authority in the following terms:<sup>25</sup>

**“On the 15<sup>th</sup> of February 2017 my office arranged a meeting between the two disputing parties to discuss an amicable solution to the dispute and at the conclusion of said meeting and upon hearing both parties, I made the decision (which I am entitled to do in terms of the Traditional Authorities Act 25 of 2000) to designate Mr. Eugene Kudumo...as the Chief of the Uukwangali Traditional Authority.”**

2.16 That was the first time that the Minister confirmed in writing the designation of Mr Kudumo as the Chief of the Uukwangali Traditional Authority, although she claims to have informed the First Applicant in a letter of 14 March 2018.<sup>26</sup> The letter was never received by the First Applicant<sup>27</sup> – and it is noteworthy that the letter was not disclosed to the Honourable Court, either in the answering affidavit or in the record of the decision furnished. Obviously, the letter does not exist.

2.17 That decision to designate Mr Kudumo as the Chief of the Uukwangali Traditional Authority, purportedly taken on 15 February 2017, is the subject of this review application.'

[4] It so appears that - in spite of the Court Order of 19 October 2016, which reviewed and set aside the first respondent's decision to designate the third respondent as Chief of the Uukwangali Traditional Community and Authority – and - which order also declared such designation as invalid and of no force and effect - the first respondent, the minister, made a further and second designation on 15 February 2017.

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<sup>23</sup> Paragraph 69 of the Applicants' founding affidavit.

<sup>24</sup> The affidavit is annexed to the Applicant's founding affidavit as annexure "P".

<sup>25</sup> See paragraph 70 of the Applicants' founding affidavit.

<sup>26</sup> Paragraph 45 of the Minister's answering affidavit.

<sup>27</sup> Paragraph 45 of the First Applicant's replying affidavit.



[5] This is per the minister's own version, as stated under oath and as contained in annexure P to the founding papers.

[6] The date of this decision is also confirmed in a subsequent letter, dated 20 April 2017, addressed by the minister to the second respondent, in which she states:

*'This letter serves to inform your office that the application to designate Mr Eugene Siwombe Kudumo has been granted based on the High Court Order of 6 April 2017 and on the Minister's decision at the meeting held with both parties on 15<sup>th</sup> February 2017'.*

#### The Government Attorney's advice

[7] This letter suggests that the minister had, on the previous day, that is on the 19<sup>th</sup> of April 2017, received advice from the Government Attorney, Mr Asino, that there were no further impediments for the minister to designate the third respondent as chief. This advice was however fundamentally flawed.

[8] While it is correct that the third respondent had brought an urgent application to stay the execution of the Court Order of 19 October 2016, pending the rescission of such order, that urgent application was however struck from the roll due to a lack of urgency.

[9] This striking already indicated that the operation of the order of the 19th of October 2016 - reviewing and setting aside the third respondent's designation by first respondent - was not stayed.

[10] Subsequently - the still pending rescission application, instituted by the said urgent application, pertaining to the October 2016 order - was also withdrawn.

[11] This meant that the decision - to set aside and review the designation of the third respondent by first respondent, as chief, and the declaration that his designation was invalid and of no force and effect - thus continued to stand.

[12] In my view - and contrary to the government attorney's advice to the minister, that there were no further impediments to the designation of the third respondent as

chief - the court order of 19 October 2016 - constituted precisely such an impediment. That court order also posed an insurmountable impediment at that. It continued to stand in the way of any designation, which was based on the one - initiated subsequent to the passing away of the previous chief - that is the first designation process, initiated through the application for approval to designate the third respondent dated 20 February 2015.

[13] While the striking of the urgent application for a stay and the subsequent withdrawal of the rescission application, most certainly signified the end of the respondent's challenge to the court order of 19 October 2016, these events most definitely did not signify that such order did not continue to stand.

[14] It was in such circumstances that the minister proceeded to make her self-confessed further decision of 15 February 2017, constituting a second designation of the third respondent, as chief.

[15] To me it seemed fairly clear, on my own reading of the papers, that no second designation process had been initiated and followed, subsequent to the first designation having been set aside by the court.

[16] It was also pretty clear that - given the requirements set by the Traditional Authorities Act 25 of 2000 - and given the views of Justice Ueitele - as expressed in *Kapia v Minister of Regional and Local Government Housing and Rural Development* (A 333/2012) [2013] NAHCMD 13 (24 January 2014) at [20], [22] to [24] and [27] - that sections 2 to 6 and possibly also section 12 of the Traditional Authority's Act have to be complied with for a valid designation of a chief or traditional leader to occur – and that thus - the failure to comply with such requirements - would obviously render the purported second attempt at designation and thus the second decision to designate - invalid.

[17] Argument, to this effect, had been made by Mr Tjombe, acting on behalf of the applicants, in his heads and at the hearing, where it was submitted that the inevitable conclusion - in the absence of compliance with the required statutory steps - which should have been initiated and which should have preceded the second designation – would have to be that such process was fatally flawed – which non-compliance, on

its own, would- and should result in the setting aside of the third respondent's second purported designation.

[18] At the hearing however, both counsel, that is Dr. Akweenda, for the first respondent and Mr Bangamwambo, for the second and third respondents, vehemently argued that a second designation process, which was a valid one, had been launched subsequent to the Court Order of 19 October 2016, resulting in the proper second designation of the third respondent - a decision purportedly made on 15<sup>th</sup> of February 2017 - and gazetted subsequently. It should be mentioned in fairness to Mr Akweenda that he left this part of the argument to Mr Bangamwambo, with which argument he however associated himself.

[19] As the court now became doubtful, that it had appreciated the record correctly, it directed counsel to submit short supplementary heads on the question whether there indeed had been a further process of designation in respect of the third respondent, in accordance/compliance with the provision of the Traditional Authorities' Act 25 of 2000 which had occurred subsequent to the Court Order of 19 October 2016 and which culminated in the first respondent's second approval of the third respondent's designation subsequently.

[20] All parties complied with the court's directions, for which the court is grateful.

#### Supplementary argument for the applicants

[21] On behalf of the applicants Mr Tjombe essentially reiterated his arguments already made previously. Again he analysed the events which occurred after the setting aside of the first designation, which events, according to him, were instructive to the conclusion that first respondent simply approved the third respondent's designation on 15 February 2017 for a second time.

[22] In his supplementary heads he submitted further:

7. ... The Minister simply approved “a designation” of Mr Kudumo on 15 February 2017 (as confirmed by her under oath<sup>28</sup>), without a designation occurring. The timeline of what occurred is instructive:

7.1 The Minister designated Mr Kudumo as the Chief of the Uukwangali Traditional Authority on 15 February 2017. This is confirmed by the Minister in her affidavit of 4 April 2017.

7.2 On 19 April 2017, Mr Matti Asino<sup>29</sup> writes a letter to the Minister, advising the Minister that the withdrawal of the rescission application:

**“...signifies the end of the challenge to the designation of Mr. Kudumo as the Chief of the Uukwangali Traditional Community. There are no further impediments for the Minister to designate Mr. Kudumo as the Chief as aforesaid.”**  
(underlining added)<sup>30</sup>

7.3 As we have argued in our main heads of arguments, this legal advice was blatantly wrong. In the same letter to the Minister, Mr Matti Asino<sup>31</sup> also advised the Minister:

**“...that formalities in terms of the Traditional Authorities Act of 2000 (Act 25 of 2000) be followed and that the appointment of Mr Kudumo be finalized.”**

7.4 The following day, i.e. 20 April 2017, the Minister addresses a letter to the Second Respondent, wherein she states that:

**“This letter serves to inform your office that the application to designate Mr. Eugene Siwombe Kudumo has been granted based on the High Court Order of 6<sup>th</sup> April 2017 and on the Minister’s decision at the meeting held with both parties on 15<sup>th</sup> February 2017.”**

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<sup>28</sup> In an affidavit deposed to on 4 April 2017, she filed in a rescission application brought by Mr Kudumo, seeking the rescission of the Court Order of Angula, DJP.

<sup>29</sup> The Government Attorney.

<sup>30</sup> Letter of 19 April 2017 from the Government Attorney, Mr Matti Asino and addressed to the Minister.

<sup>31</sup> The Government Attorney.

7.5 In the same letter, the Minister invites the Second Respondent to invite her to attend to the designation as contemplated in section 5(7) of the Traditional Authorities Act. This is clear to be a ceremonial event in furtherance of the formal requirements under the statute.

7.6 On 26 April 2017, the Second Respondent replied and set a date, place and time of “the official inauguration of his Majesty (Chief) Homba Eugen Siwombe Kudumo of the Ukwangali Traditional Community as requested by your office.” (*sic*)

7.7 In a letter of 28 April 2017, the Minister accepts the invitation and delegates the responsibility to witness the designation on her behalf:

**“I am however not able to attend the official designation ceremonies due to prior Ministerial commitments. I have, therefore, delegated Mr. Phillip Tjerije, my Special Advisor on Traditional Matters to represent me and to witness the designation on my behalf.”** (underlining added)

7.8 In a letter of 28 April 2017, the Minister accepts the invitation and delegates the responsibility to witness the designation on her behalf:

8. Firstly, it is obvious that the Minister designated Mr Kudumo at the Chief of the Uukwangali Traditional Authority on 15 February 2017. But then, in a letter to the Second Respondent, she appears to have designated Mr Kudumo “...based on the High Court Order of 6<sup>th</sup> April 2017.” This is obviously humanely impossible to have based the designation on a latter event.

9. Also, a further contradiction is apparent: the Minister in her purported letter to the First Applicant, the Minister claims that she made the decision:

**“On this date, the 15<sup>th</sup> of February 2017 after I heard from all the parties and as a Sector Minister and informed by the Recommendations of the Investigation Committee, I have decided to support and to agree fully with the recommendation that says that Eugene Siwombe Kudumo is eligible candidate for succession to the Chieftainship of the Ukwangali Traditional Authority.”**

But then claims in paragraph 15.6 of her answering affidavit that:

**“I did not designate the Third Respondent at the meeting.”**

10. Secondly, the designation is by the traditional community – not the Minister. The traditional community applies for the approval of the designation, as contemplated in section 5(1) of the Traditional Authorities Act. In paragraph 5 of her answering affidavit, the Minister expressly states that:

**“I record that I made a decision to designate the Third Respondent as the Chief of the Uukwangali Traditional Authority.”**

11. This is repeated throughout her answering affidavit, such as at paragraph 7 thereof, where she states that

**“After I made the decision to designate the Third Respondent as the Chief of the Uukwangali Traditional Authority...”**

12. And paragraph 14:

**“It is on the basis of the Report of the Investigation Committee that I designated the Third Respondent as Chief of Uukwangali Traditional Authority.”**

13. Further and most importantly, the Third Respondent has not submitted a fresh application for approval of the designation to the Minister. The record of the decision, which was availed by the Minister, includes only the completed application forms and supporting documents for approval of designation, which were completed in 10 February 2015 and were submitted in respect of the first designation which was set aside by Angula, DJP on 19 October 2016.

14. Thus, there could not have been any new designation after 19 October 2016, and any process thereafter was flawed, as we have pointed out in our main heads of argument.’

[23] After analysing the various statements made by the first respondent attempting to justify her second decision he reiterated that there was simply no fresh application for approval submitted as also the review record only revealed the first application together with its supporting documents, which were completed as far

back as 15 February 2015 and which had been submitted in respect of the then applied for first attempted designation, which was then set aside by Angula DJP on 19 October 2016. There could thus not have been any new designation after 19 October 2016, so counsel's concluding argument ran.

#### Supplementary argument for the respondents

[24] On behalf of first respondent Mr Akweenda submitted, inter alia again - and he reiterated the point - that in the case, which had culminated in the court order of 19 October 2016, the investigation committee had not been cited as a party. In essence it was however contented that the question raised by the court did not relate to the case the respondents were expected to meet and that this issue was thus irrelevant to the case. Great reliance was placed in this regard on the Supreme Court decision made in *Nelumbu & Others v Hikumwah & Others* 2017 (2) NR 433 (SC).

[25] Two points can immediately be made, namely that the *Nelumbu* Judgment does not find application in this matter, as firstly the point, embodied by the court, in its court order of 19 February 2019, was not only raised- and dealt with in the heads of argument already submitted Mr Tjombe, on behalf of the applicants, but the point was also squarely raised in paragraph 83 of the founding papers – and – secondly - that the *Oudekraal* decision<sup>32</sup> also finds no application in respect of the recommendation made by the investigation committee, which recommendation does not amount to an administrative decision, which continues to stand until reviewed and set aside, but which recommendations and findings were made squarely in terms of Section 12 (2) of Traditional Authorities Act and where the investigation committee in terms of Section 12 (2) of that Act merely has to investigate and report to the minister concerning its findings and recommendations<sup>33</sup> – and - where Section 12(3) then makes it clear that it is then incumbent on the minister, on receipt of the report, to make a decision.<sup>34</sup>

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<sup>32</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1; [2004] ZASCA 48) at [37].

<sup>33</sup> '(2) On receipt of a petition referred to in subsection (1), the Minister may appoint an investigation committee consisting of such number of persons as he or she may determine, to investigate the dispute in question and to report to the Minister concerning its findings and recommendations.'

<sup>34</sup> '(3) The Minister shall on receipt of the report referred to in subsection (2) take such decision as he or she may deem expedient for the resolutions of the dispute in question.'

[26] These supplementary arguments made by Dr. Akweenda accordingly did not take the fundamental question raised by the court in its order any further.

[27] Mr Bangamwabo on behalf of second and third respondents however persisted with his original submissions that indeed, in the aftermath of the Court Order of 19 October 2016, a second- and fresh process of designation did take place.

[28] More particularly it was submitted in his supplementary heads:

'5. In this respect, and in support of our submissions, this honourable Court is referred to the Second Respondent's answering affidavit. Specifically, Mr. Christian N. Shimuketa, who is the Chairperson of the Uukwangali Traditional Authority, states under oath at **paragraphs: 7,8, and 9 of his affidavit** that a new process of designation by the Second Respondent took place. Same deponent further avers that, on behalf of the Second Respondent, he did apply for the approval of the designation of the 3<sup>rd</sup> Respondent to the First Respondent, who then granted the approval in terms of Section 5 (2) of Act 25 of 2000. 2<sup>nd</sup> Respondent further avers that the 3<sup>rd</sup> Respondent has been since recognized by the Fourth Respondent in terms of Section 6 of Act 25 of 2000.

6. The Second Respondent's averments with regards to the designation in terms of Section 4 (1) of the Act, the application for approval in terms of section 5 (1) and the granting of the application by 1<sup>st</sup> Respondent in terms of Section 5(2) are corroborated by the undisputed and unchallenged content of the review record filed by the First Respondent in terms of Rule 76 (6) on 25 July 2017. A copy of the Notice in terms of Rule 76 (6) by the First Respondent is hereto attached as **Annexure "A"**.

7. A closer look at pages 3, 4, 5 and 2 of Annexure "A" (supra) evinces that indeed, in the aftermath of the court order of 19 October 2016, a second and fresh process of designation took place. Further, page 5 of *same Annexure* clearly shows that the decision by the First Respondent to approve the designation was made on **20 April 2017**. In this respect, the Honourable Court is also referred to **2<sup>nd</sup> & 3<sup>rd</sup> Respondent's revised heads, at paras. 18.1 – 18.5**

8. Further, these documents, disclosed in terms of Rule 76(6) are not disputed or challenged by the Applicants. This is so because upon receipt thereof, Applicants, if they so wished, ought to have varied, amended and or supplemented their founding papers in terms



of Rule 76 (9). This, they did not do. The upshot of Applicants' conduct herein is that they admit the correctness thereof.'

[29] It so appears that reliance was placed on the second respondents averments based on annexure "A", pages 3, 4 and 5 thereof and those based on document 2.

[30] On closer examination document 2 is a letter, dated the 28<sup>th</sup> of April 2017, from the Minister to the Chair of the second respondent, thanking him for his invitation to witness the official designation ceremony.

[31] Importantly document 3 is the original application for approval, to designate the third respondent as chief, in the first designation process, as set aside. This is a document which is dated as far back as 10 February 2015.

[32] Document 4 is dated 9 May 2017. It is a letter written on behalf of the second respondent to the Minister thanking her for her decision to designate the third respondent.

[33] Document 5, dated 20 April 2017, is a letter to the Acting Chair of the second respondent. It was written to inform the Traditional Authority that the third respondent's application, for designation, had been granted.

[34] It thus appears that, with the exception of document 3, that all the other relied upon documents, are documents authored after the first respondent's second decision, to designate the third respondent, had been made on 15 February 2017. These documents therefore cannot assist the respondents' cases on the score that a second designation process had been initiated as prescribed by the Act.

[35] On the other side of the coin, document 3 is also not supportive of Mr Bangamwabo's argument. On the contrary, it is rather destructive of it, as it rather bears out the argument made on behalf of the applicants, that the second designation was not made consequent and upon the submission of a fresh application for approval made in terms of Section 5(1) of the Traditional Authorities

Act<sup>35</sup> which was initiated after 19 October 2016, in accordance with the requirements set by Section 4(1) of the Act.<sup>36</sup>

[36] In any event the Minister should by then have been well aware of the fact that there was a dispute amongst the members of Uukwangali Traditional Community and in order to ensure that the third respondent be properly designated again - in accordance with the requirements set by Section 4 – and - if a second application for the approval of the Third Respondent's designation would have been made in terms of Section 5, it would again have been incumbent on- or at least advisable for the Minister, in view of the still simmering dispute amongst the members of the traditional community - to set in motion the 'settlement of disputes procedure' provided for in Section 12(2). Also such a process was clearly not followed for a second time.

[37] I have already dealt with Mr Bangamwabo's further argument based on the reliance of the *Nelumbu* judgment in respect of which I have come to the conclusion that this decision finds no application in this case.

#### The asserted failure to exhaust the Section 8 mechanism

[38] Finally, it should be mentioned that the point was raised that the applicants should have resorted to the mechanisms provided for by Section 8 (1) of the Traditional Authorities in terms of which a chief or head of a traditional community may be removed from office by the members of the community.<sup>37</sup> This question turns in the first instance on the interpretation of the governing provision which may be indicative of whether or not such 'internal' dispute resolution mechanism should first be exhausted.<sup>38</sup>

<sup>35</sup> '5 (1) If a traditional community intends to designate a chief or head of a traditional community in terms of this Act-

(a) the Chief's Council or the Traditional Council of that community, as the case may be; or

(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, shall apply on the prescribed form to the Minister for approval to make such designation, and the application shall state the following particulars: ... '.

<sup>36</sup> '4. (1) Subject to sections 5 and 6, members of a traditional community who are authorised thereto by the customary law of that community, may designate in accordance with that law- ... '.

<sup>37</sup> '8 (1) If there is sufficient reason to warrant the removal of a chief or head of a traditional community from office, such chief or head may be removed from office by the members of his or her traditional community in accordance with the customary law of that community.'

<sup>38</sup> See for instance: *Namibian Competition Commission v Wal-Mart Stores Incorporated* 2012 (1) NR

[39] In this regard it appears that the wording of the Section is not couched in peremptory terms which states that the procedures set by the Section 'may' be utilised and 'may' be set in motion, which language clearly signifies that there is no absolute obligation imposed for the utilisation of the Section 8 process.

[40] In the second instance the remedy provided for would also not have been an effective remedy in the circumstances. The review procedure utilized on the other hand was ideally suited for the purpose for which the applicants have engaged it. It is thus doubtful whether Section 8 would have provided the applicants with an effective remedy for which review proceedings were obviously much better suited in view of the underlying facts pertaining to this case.

[41] It is for these reasons that I do not uphold this point *in limine*.

#### Resolution

[42] At the same time it will have become clear that the second purported designation, of the third respondent, as approved by the first respondent on 15 February 2017, cannot be sustained in circumstances where the pre-conditions for a valid designation process, set by the governing statute, were not complied with and which non-compliance thus fundamentally flaws the second decision of the first respondent, as made on 15 February 2017, and which subsequently culminated in the consequent recognition of the third respondents designation by proclamation in the Gazette.

[43] In the result the application succeeds and it is ordered that:

1. The second decision of the first respondent, as made on 15 February 2017, to designate the third respondent as the Chief of the Uukwangali Traditional Community and the Uukwangali Traditional Authority is hereby reviewed and set aside, and such designation is declared as invalid and of no force or effect.

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69 (SC) at [45] to [47], see also: *NUNW v Naholo* 2006 (2) NR 659 (HC) and *Tjirovi v Minister for Lands and Resettlement and Others* 2018 (2) NR 358 (HC).

2. The first, second and third respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
3. The case is regarded as finalised.

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H GEIER  
Judge

## APPEARANCES

## APPLICANTS:

N Tjombe

Tjombe-Elago Law Firm Inc., Windhoek

1<sup>st</sup> RESPONDENT:

S Akweenda (DR)

Instructed by Government Attorney, Windhoek

2<sup>nd</sup> & 3<sup>rd</sup> RESPONDENTS:

F Bangamwabo

FB Law Chambers, Windhoek