REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2018/00254

In the matter between:

MARIA UKAMBA HAINDAKA	**APPLICANT**

and

THE MINISTER OF URBAN AND RURAL DEVELOPMENT	**FIRST RESPONDENT**
SHAMBYU TRADITIONAL AUTHORITY	**SECOND RESPONDENT**
SOFIA MUNDJEMBWE	**THIRD RESPONDENT**
ELECTORAL COMMISSION OF NAMIBIA	**FOURTH RESPONDENT**
COUNCIL OF TRADITIONAL LEADERS	**FIFTH RESPONDENT**

Neutral citation: *Haindaka v The Minister of Urban and Rural Development* (HC-MD-CIV-MOT-GEN-2018/00254) [2019] NAHCMD 281 (9 August 2019)

Coram: ANGULA DJP
Heard: **7 May 2019**
Delivered: **9 August 2019**

Flynote: Customary Law – Traditional Authority – Traditional Authorities Act 25 of 2000 – Section 8 setting out procedure for succession of a Chief upon death or removal of a Chief or Head of a traditional community – Designation in terms of s 8 is

made by members of the traditional community authorized thereto in terms of the customary laws of that traditional community – Where a dispute arises regarding designation – The dispute may be referred to the Minister, in terms of s 12, by written petition signed by the parties to the dispute – Such dispute is a dispute between the members of the traditional community, who are so authorized and is not a dispute between the proposed designated candidates.

Summary: This matter concerns a succession dispute – The Royal Family of the Shambyu traditional community is called the Vakwankora; it is made upon of two clans the Mukwahepo and the Mwengere – Following the death of late Chief Ms Angelina Ribebe, each clan nominated a person for designation as a Chief to succeed the late Chief, Ms Angelina Ribebe – In terms of the customary law of succession of the Shambyu traditional community, chieftaincy follows the matrilineal lineage.

As a result of the two nominations by the royal clans, a succession dispute arose. This dispute somehow made it to the desk of the erstwhile Minister of Urban and Rural Development, Minister Sofia Shaningwa.

In a bid to resolve the dispute the minister, acting in terms the provisions of the Traditional Authorities, Act 2000, Act No. 25 of 2000, ('the Act') appointed an investigation committee to investigate the dispute and to report to her concerning its findings and recommendations. After conducting its investigation, the committee submitted a report to the minister and upon its recommendation, she made a decision on 23 January 2017, whereby she ordered the royal family to resolve their dispute within four months.

In the meantime a changing of the guard took place at the relevant ministry whereby, the incumbent Minister Honourable Mushelenga, was appointed to replace Ms Shaningwa. On 29 June 2018, shortly after his appointment he made a decision acting in terms of the Act, and addressed a letter to the parties granting approval for elections to be held amongst the members of the Shambyu traditional community to determine who of the two nominees is to succeed the late Chief Ribebe.

Following receipt of the minister's said decision in writing, Ms Haindaka filed an application on an urgent basis, whereby she sought an order to interdict the holding of the election, pending the outcome of review proceedings in Part B of the Notice of Motion that are aimed at setting aside the minister's said decision. The interim interdict was granted.

The third respondent, Ms Kanyetu, apart from opposing the relief sought by Ms Haindaka, has filed a counter-application, in which she seeks several order – *inter alia*, an order that: following the death on 12 February 2017 of Mrs Kanyanda, who was the nominee of the Mukawahepo clan, there was no longer a dispute, and that by default the nominee of the Mwengere royal clan has to be accepted as the candidate designated to succeed the late Chief.

Held, that the minister's decision to order elections in terms of s 5(10) was invalid for the reason that the present dispute between the parties is not the dispute envisaged by s 5(10), in that the dispute is not that there is no customary law in existence regarding the designation of a chief or head, nor is the dispute about uncertainty or disagreement about the applicable customary law.

Held further, that the dispute is between the two clans comprising the royal family and not between the two nominees of the two clans.

Held further that, until and unless the minister's decision to act in terms of s 12 stands and is not reviewed and set aside, it would be incompetent for the court in the present matter to issue a declarator as sought in the counter-application. Accordingly, the counter-application was dismissed with costs.

ORDER

Main application:

1. The decision communicated to the parties by the minister in his letter dated 29 June 2018 is hereby reviewed and set aside.

2. The matter is remitted to the minister to take such decision as he may deem expedient for the resolution of the dispute between the two clans.

3. The first, second and third respondents are ordered to pay the applicant's costs in the main application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructed and one instructing counsel.

Counter-application

4. The counter-application is dismissed.

5. The first and second applicants in the counter-application are ordered to pay the respondents' costs, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructed and one instructing counsel.

6. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This matter concerns a succession dispute between two clans of the royal family as to who should succeed to the chieftaincy of the Shambyu traditional community following the death of their chief, Ms Angelina Matumbo Ribebe, who died on 14 June 2015. This traditional community is situated in the Kavango West Region of this Republic. The Vakwankora royal family is the recognized royal family

entitled to designate a successor, called a Hompa, to succeed the deceased Hompa, Ms Angelina Ribebe.

[2] The Vakwankora royal family, is made up of two matrilineal clans, the Mukwahepo and the Mwengere. Following the death of Chief Angelina Ribebe, the Mukwahepo nominated Ms Maria Kanyanda, to succeed her as a Chief. The Mwengere, on the other hand nominated, Ms Sophia Mundjembwe Kanyetu to succeed her as a chief.

[3] It so happened that while the minister responsible for matters of traditional authorities was considering the nominated candidates, Ms Maria Kanyanda, the nominated candidate for the Mukwahepo, died in February 2017. Subsequently, the Mukwahepo clan nominated the applicant, Ms Haindaka, as candidate to succeed as a chief. A dispute then ensued as to who of the two nominated candidates should succeed the late chief of the Shambyu traditional community. It is that dispute which currently serves before this court.

[4] The dispute came before this court following the minister's decision communicated to the parties in his letter dated 29 June 2018, ordering the members of the Shambyu traditional community to hold an election to elect, between the two nominated candidates, as who should be the chief of that community. Following receipt of the minister's letter, Ms Haindaka brought an urgent application in which she sought an order interdicting the holding of such an election. The order was granted, whereby the proposed elections were stayed pending the outcome of the present review proceedings.

[5] The matter is now before this court to determine whether the minister was correct in ordering such an election to be held. The court is also called upon, by way of the counter-application, to declare that there is no longer a succession dispute following the death of the late Ms Maria Kanyanda; and that Ms Sofia Kanyetu be declared, recognized and approved by the Minister as the successor to the chieftaincy of the Shambyu traditional community.

<u>The parties before court</u>

[6] The applicant is Ms Maria Ukamba Haindaka, a major female person, residing at Safari Township, in the town of Rundu, Republic of Namibia. She is a member of the Vakwankora royal family and is further a member of the Mukwahepo, a matrilineal clan, which is part of the Vakwankora royal family. The applicant has been nominated by the Mukwahepo family as a successor to the chieftaincy of the Shambyu traditional community.

[7] The first respondent is the Minister of Urban and Rural Development. He is responsible for the administration of traditional authorities, pursuant to the provisions of the Act. I shall henceforth refer to the first respondent as 'the Minister'.

[8] The second respondent is the Shambyu Traditional Authority, established in terms of s 2 of the Act, with its offices situated at Kayengona Village, Kavango East Region, Republic of Namibia.

[9] The third respondent is Ms Sophia Mundjembwe Kanyetu, a major female, residing at Millennium Park Township, in Rundu in the Republic of Namibia. She is a member of the Vakwankora royal family and is further a member of the Mwengere matrilineal clan which is also part of the Vakwankora royal family. She has been nominated by the Mwengere clan as a successor to the chieftaincy of the Shambyu traditional community.

[10] The fourth respondent is the Electoral Commission of Namibia, established by s 2 of the Electoral Commission Act, 2014 (Act No. 5 of 2014). Its offices are situated at 67-71 Van Rhijn Street, Windhoek. This respondent was initially cited in these proceedings because it was to conduct the elections amongst the members of the Shambyu traditional community, which elections were ordered by the minister, aimed at electing a successor to the chieftaincy of the Shambyu community. Following the ruling by the court on 16 August 2018, that it was not permissible to hold the envisaged elections in terms of the Act, this respondent no longer has a role to play in these proceedings; in any event, no relief is or was sought against it.

[11] The fifth respondent is the Council of the Traditional Leaders, established by s 2 of the Traditional Leaders Act, 1997 (Act No. 13 of 1997). Its offices are situated at the corner of Harold Pupkewitz and Shakespeare Street, Windhoek. No relief is sought against this respondent. It was cited merely for the interests it might have in the dispute in the Shambyu Traditional Authority.

Factual background

[12] On 14 June 2015, Chief Angelina Matumbo Ribebe of the Shambyu traditional community passed away. Her death triggered a succession dispute within the Vakwankora royal family. There are two royal clans within the Vakwankora royal family from which a successor to the chieftaincy of the Shambyu traditional community may be selected: the Mukwahepo and the Mwengere royal clans. In terms of the Shambyu customary law of succession, it is accepted that chieftaincy follows the matrilineal lineage. The Mukwahepo and the Mwengere are both such matrilineal clans.

[13] The Mukwahepo clan nominated Ms Maria Kanyanda, whereas the Mwengere clan nominated the third respondent, Ms Sofia Kanyetu, for one of them to be designated as a successor to the late Chief Angelina Ribebe. Shortly after her nomination, Ms Maria Kanyanda, the nominee of the Mukwahepo clan, died on 12 February 2017. Subsequently, the Mukwahepo clan then nominated the applicant, Ms Maria Haindaka, as a successor to the late Chief Angelina Ribebe.

The dispute

[14] As a result of the two nominations, a dispute of succession ensued between the two clans as to who of the two nominees should succeed to the late Chief Angelina Ribebe. It would appear that the Mukwahepo clan was of the view that the chieftaincy must be given to their nominee, Ms Maria Haindaka, because they have not had a chance to rule for over 75 years, as it should allegedly be, in accordance with the Shambyu customary laws. The Mwengere clan, for their part, alleged that the late Chief Angelina Ribebe, had left a verbal ‘Will’ in terms of which she had

nominated Ms Sofia Kanyetu of the Mwengere clan as her successor. They further contended that the term of the Will should be respected and be given effect.

The minister takes decisions to resolve the dispute

[15] In order to resolve the dispute, the erstwhile minister appointed an investigation committee, purportedly acting in terms of s 12 of the Act, to investigate the succession dispute between the two clans and thereafter to report its findings and make recommendations to her. I say 'purportedly' because it is contended by Ms Kanyetu that, in appointing the investigating committee, the Minister did not comply with the relevant provisions of the Act. Be that as it may, the committee carried out its investigation and filed a report with the Minister. Following receipt of the report by the investigation committee, the Minister made a decision – the first decision – and communicated her decision to the two clans in her letter dated 23 January 2017. The minister's decision was to the effect that:

> '(a) The Vakwankora royal family is afforded an opportunity to resolve their royal family succession issue without involvement of the non-Vakwankora royal family members;
>
> (b) If the Vakwankora royal family fail to resolve their succession issue, they must seek assistance from the Kavango East and West Traditional Authorities Regional Forum;
>
> (c) The succession dispute should be resolved and finalised within a period of four (4) months from the date of receiving this letter;
>
> (d) Should the Vakwankora royal family fail to resolve the succession dispute within the period of four (4) months, elections to select the new Hompa must be held as a last resort, since both candidates are from the female lineage and both are from the maternal family side and hence eligible in terms of the relevant customary law; and
>
> (e) Both parties to the dispute should adhere to the above resolution and are welcome to approach the Ministry for clarity with regard to the resolution.'

[16] The dispute was not resolved, even long after the deadline of four months determined by the minister. In the meantime, a changing of guard, so to speak, took place at the Ministry of Urban and Rural Development in February 2018, whereby the erstwhile minister was replaced with the incumbent minister.

[17] In an attempt to break the deadlock with regard to the succession dispute between the two royal clans, the Mukwahepo and the Mwengere, regarding the person to succeed the late Chief Angelina Ribebe, the new incumbent minister, on 29 June 2018 made a decision – the second decision by the minister – purportedly acting in terms of s 5(10) of the Traditional Authorities Act in which he decided to 'grant approval for elections to be held to elect the chief of the Shambyu Traditional Authority'. I say 'purportedly' because, as it will become apparent later in this judgment, it has been conceded by the Minister that the provisions of section 5(10) find no application to the facts of the present matter. In any event, the elections were slated to take place on 18 August 2018. The Minister further declared the contesting candidates to be the applicant, Ms Haindaka and the third respondent, Ms Kanyetu.

Urgent application to stay the holding of elections

[18] Following the minister's second decision mentioned above, Ms Haindaka lodged an urgent application in which she sought, amongst other orders, an order interdicting the holding of the said elections, pending the outcome of the review proceedings aimed at setting aside the minister's decision. The applicant further sought an order that the dispute be referred back to the minister for reconsideration. In the alternative, the applicant sought an order declaring the minister's said decision as *ultra vir*es and null and void, for want of compliance with the provisions of the Act.

[19] The urgent application served before me on 13 August 2018. Having heard arguments from the parties, I granted the interim interdict on 16 August 2018, whereby the intended elections were stayed pending the outcome of the current review proceedings.

The third respondent's counter-application

[20] While conceding that the relief sought in the main application should be granted, Ms Kanyetu filed a counter-application in which she seeks the following orders: 'An order declaring that with effect from 12 February 2017 on which Ms Maria Kanyanda died, from that date there was no dispute pending for resolution by the minister in terms of s 12 of the Act'. Accordingly, Ms Kanyetu seeks an order that the minister be directed to recognize and approve her designation as the chief of the Shambyu traditional community.

[21] In the alternative, Ms Kanyetu seeks an order declaring that the application submitted by the applicant, Ms Maria Haindaka, to the minister in terms of s 5(1), for her to be designated as a chief, as *ultra vires* the provisions of the said s 5 in that it was not submitted to the minister by the Chief's Council. Furthermore, she seeks an order declaring that the said application was *ultra vires* Regulation 2 made in terms of the Act, in that the application was not signed by the Governor for Kavango West Region. Regulation 2 requires the Governor to verify the information contained in the said application. In this connection Ms Kanyetu submits that Ms Haindaka's application to the minister to be designated as chief is a nullity and *void ab initio*, as it had not been signed by the Governor as stipulated by Regulation 2 of the Regulations promulgated under the Act.

[22] In support of the relief she seeks in her counter application, Ms Kanyetu argues that by the time the late Ms Maria Kanyanda passed away, on 12 February 2017, the Minister had already communicated to the parties how the dispute should be resolved. Therefore after the late Ms Maria Kanyanda passed away, Ms Kanyetu further argues, there was no longer a dispute pending before the minister for adjudication. The minister has the power in terms of the Act to take such decision as he or she may deem expedient for the resolution of the dispute in question. Section 12(3) empowers the minister to take a decision aimed at resolving the dispute after receipt of the report from an investigating committee, but taking into account the relevant customary law and practice. Ms Kanyetu further seeks an order to the effect that there is only one application before the minister for approval for designation, namely her designation as a chief of the Shambyu traditional community.

[23] Ms Kanyetu further argues that when the erstwhile minister commissioned an investigating committee in terms of s 12, the commissioning had not been in compliance with the provisions of s 12, in that no written petition had been submitted to the minister by the parties as stipulated by the said section and for that reason the invocation of s 12 of the Act was incorrect and therefore invalid.

Opposition by the applicant to the counter-application

[24] As regards Ms Kanyetu's allegation that the Chief's Council of the Shambyu traditional community applied to the minister for her designation as chief, Ms Haindaka denies that a Chief's Council exists after the death of the Chief. In other words, after the death of the late Chief Angelina Ribebe, no Chief's Council existed as, so to speak, it 'died' with the chief. She further argues, in this connection that Ms Kanyetu's application was invalid because it was alleged to have been submitted a by a non-existent body, being the Chief's Council of the Shambyu traditional community, which had ceased to exist after the death of Chief Angelina Ribebe, who was its Chairperson. In essence, Ms Haindaka alleges that without a Chief there can never be a Chief's Council. Therefore at the time when Ms Kanyetu's application was submitted, there was no Chief's Council and accordingly the application did not comply with the provisions of s 5 of the Act.

[25] In response to the allegation that the dispute was between the applicant and the third respondent and not between the two royal clans, Ms Haindaka asserts that the dispute is indeed between the two royal clans. She further denies that there was a verbal 'Will' left by the late Chief Ribebe, nominating Ms Kanyetu as a successor. She contents further that even if such a 'Will' was left, it does not find application in terms of the Shambyu customary laws.

[26] As regards Ms Kanyetu's allegation that there was no longer a dispute between the parties after Ms Maria Kanyanda passed away on 12 February 2018, Ms Haindaka points out that on 24 February 2017, the Mukwahepo clan had received the erstwhile minister's letter in which she communicated her decision to appoint an investigation committee to advise her as to who was eligible between the two nominees of the two clans; that by the time the Minister's letter was received, the

Mukwahepo clan had already communicated to the minister their replacement of the late Ms Kanyanda with Ms Haindaka, in their letter dated 21 February 2017. Ms Haindaka further points out that the Mukwahepo initial application submitted had, in any event, not been signed by the Governor.

Submissions on behalf of the parties

[27] Mr Namandje, who appeared on behalf of Ms Kanyetu (the counter-applicant) advanced two reasons in his written submissions why the counter-application should succeed. Firstly, that the late Ms Maria Kanyanda passed away after the minister had already communicated to the parties how the dispute between the two clans should be resolved; and that therefore, after the death of Ms Maria Kanyanda, there was no longer a dispute. In other words, the dispute, as counsel put it, 'evaporated' with the death of Ms Maria Kanyanda. Therefore, so submits counsel, there was only one application before the minister, under which circumstances the minister is in law obliged to approve the designation of Ms Kanyetu. Secondly, in any event, the applicant's application was *ultra vires* the provisions of the Act and the Regulations, as it had not been signed by the Governor as prescribed by the Regulations. Counsel submits further and places heavy reliance on the judgment in *Nguvauva v Minister of Regional and Local Government and Housing*[1]. He argues that with respect to the counter-application in the present matter, the facts and the dispute are the same as those in the *Nguvauva* matter. He therefore urges upon the court to follow the result in the *Nguvauva* matter.

[28] In order to provide context to the reader: The facts in the *Nguvauva* matter were briefly these: Following a succession dispute between two royal nominees, the minister had ordered that an election be held to elect a successor to the chieftaincy. One of the nominees passed away before the elections were concluded. The court held that the dispute as to who the traditional community should elect 'died' or 'disappeared', upon the death of one of the nominees, after which the minister had only one nominee to approve in terms of s 5(2) of the Act. Parker, AJ reasoned as follows:

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

'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[2].'

[29] Relying on the *Nguvauva* judgment and other case law cited, Mr Namandje submits that the Minister in the present matter, as it was held by the court in the *Nguvauva* matter, has an obligation to approve the application by Ms Kanyetu upon the death of Ms Maria Kanyanda as it is the only application before the minister.

[30] Mr Nekwaya for Ms Haindaka, for his part, submits contrawise in his written submissions before court. He submits that the minister has accepted and has recognized Ms Haindaka's application for designation by directing that she participate in the election for the chieftaincy; and furthermore, on the papers before court, the Minister never disavowed his acceptance of Ms Haindaka's application for designation as chief.

[31] Counsel further submits that the minister is *functus officio* in his acceptance of Ms Haindaka's application. Therefore his decision stands until it is reviewed and set aside. In this connection counsel relies on the well-known judgment of *Oudekraal*[3] where the principle was laid down. In this regard counsel points out that there is presently no application before court seeking the review and setting aside of the minister's decision to accept Ms Haindaka's application.

---

[2] *Nguvauva v Minister of Regional and Local Government Housing* (A 254/2010) [2014] NAHCMD 290 (2 October 2014) para 23.
[3] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA).

[32] Mr Nekwaya further submits with reference to s 9 of the Act which provides for the establishment of a Chief's Council, that a Chief's council is not a body with perpetual succession; it is merely aimed at conducting the day-to-day activities of a Traditional Authority; and that the composition of the Chief's Council is incomplete without the Chief. Accordingly, Ms Kanyetu's application is invalid, as it was submitted by a non-existent body after the death of Chief Angelina Ribebe.

[33] Finally, Mr Nekwaya submits that the declaratory order seeks to usurp impermissibly the minister's statutory functions in so far as it seeks to order the minister to 'recognize and approve', Ms Kanyetu's designation as chief, as to do so would violate the principle of separation of powers between the Executive and the Judiciary.

The minister concedes

[34] When the matter was called on 5 May 2019 to consider the review relief sought in Part B of the Notice of Motion of the application by Ms Haindaka, namely that the minister's decision contained in his letter dated 29 June 2018, granting approval for elections to be held, be reviewed and set aside, counsel for the parties, including counsel for the said minister, informed the court that the parties were *ad idem* that the minister's said decision should be set aside. It thus became unnecessary for the court to decide why the said decision should be set aside.

[35] In order to put the minster's concession into perspective, it is necessary to quote the provisions of section 5(10). The sub-section provides as follows:

> 'If, in respect of a traditional community –
>
> (a) no customary law regarding the designation of a chief or head of a traditional community exists; or
>
> (b) there is uncertainty or disagreement amongst the members of that community regarding applicable customary law, the members of that community may elect, subject to the approval of the Minister, a chief or head of the traditional

> community by a majority vote in a general meeting of the members of that community who have attained the age of 18 years and who are present at that meeting.'

[36] Having regard to the provisions of s 5(10) above read in the context of the facts of the present matter, it is clear that the minister misconstrued the applicability of the provisions of s 5(10) in so far as the dispute between the two royal clans does not relate to the fact that 'no customary law regarding the designation of a chief or head of a traditional community exists; or there is uncertainty or disagreement amongst the members of that community regarding the application of customary law'. It follows therefore that in the absence of a 'disagreement or uncertainty' about the applicability of the customary laws, the provisions s 5(10) finds no application to the present dispute. I am of the view that, under those circumstances, the Minister's concession has been wisely made.

Issues for decision

[37] It would appear therefore that, with the foregoing concession, by the minister, there are only two issues for determination in the present matter. Firstly, whether the dispute as to succession to the chieftaincy is between the two clans or whether the dispute is between the two nominees of the clans. Secondly, whether the counter-applicant is entitled to seek a declarator while the erstwhile Minister's decision (the first minister's decision) declaring the dispute between the parties still stands.

Applicable legal principles

[38] In order to answer the questions posed in the immediately preceding paragraph, it is necessary to interrogate the relevant provisions of the Act and thereafter to apply the relevant statutory provisions to the facts of this matter. The court accordingly proceeds to do so.

Relevant statutory provisions of the of the Act

[39] The relevant statutory provisions are: sections 4, 5, 6, 8, and 12 of the Act. Below, I briefly summarise the provisions of the said sections.

[40] Section 4 provides that members of a traditional community who are authorized thereto by the customary law of that community may designate one person from the royal family of that community as a chief or head. In terms of s 5, such traditional community shall apply to the minister for approval to make such designation. If the application is compliant, the minister shall, in writing, approve the proposed designation. If the application is not compliant for the reasons stated in ss 3 of s 5 and the minister does not approve the proposed designation, he or she shall advise the President accordingly.

[41] Section 5(6) provides that the President shall, upon receipt of the minister's advice as to why he or she did not approve the proposed designation, refer the matter to the Council of Traditional Leaders for its consideration and recommendations. Upon receipt of the recommendations by the Council of Traditional Leaders, the President shall, in his or her discretion and in writing, either approve or reject the proposed designation.

[42] In the event, that the minister approves the designation in writing in terms of s 5(2) he or she shall advise the Chief's Council or Traditional Council.

[43] Section 5(7) provides that upon receipt of the written approval by the minister, in terms of s 5(2) or by the President in terms of s 5(6), the Chief's Council or the Traditional Council, as the case may be, of that traditional community shall in writing give the minister prior notice of the date, time and place of the designation. It is a requirement of s 5(7)*(a)* that the minister or his or her representative shall attend and witness the designation. The chief or head shall at his designation take a prescribed oath or affirmation with regard to his office, as prescribed in terms of the relevant customary law of that traditional community. The minister or his or her representative of that traditional community must be satisfied that such designation is in accordance with the customary law (section 5(7)*(b)*).

[44] Sub-sections 9 provides that if the provisions of ss 5(1) and (7) have not been complied with, the designation of the chief or head shall be invalid. It is to be remembered that ss 1 provides that if a traditional community intends to designate a

chief or head, it shall apply, on the prescribed form, to the minister. Sub-section 7 deals with the process after the minister has witnessed the designation, commonly referred to as the coronation.

[45] The minister, having attended and witnessed the coronation, and further being satisfied that the designation took place in accordance with the customary laws and practices of that community, he or she is required in terms of s 6(1), to notify the President in writing of the designation of such chief or head. The President, upon receipt of the notification from the minister that the designation had been conducted in accordance with the requirement of the Act, shall recognize the designation of that chief or head by proclamation in the Gazette pursuant to the provisions of s 6(2).

[46] Section 8 of the Act deals with removal or death and succession of a chief or a head of a traditional community. I will focus my attention on the scenario where the issue of succession has been triggered by the death a chief, such as in the present matter.

[47] Section 8(2) provides that if a chief dies 'the members of the traditional community, who are authorised thereto by customary law, may designate in accordance with this Act, a member of that traditional community to replace such chief or head' who died.

[48] Section 8 makes a distinction between the process after the death of the chief and the removal of a chief. In the case of the removal of a chief or head, ss (3) provides that 'the minister shall notify the President of such removal'. The President is required, upon receipt of the notification of removal from the minister, to recognize such removal by proclamation in the Gazette announcing such removal.

[49] I interpose to point out that in the case of the death of the chief or head, the minister is not required by the section to notify the President, neither is the President required to notify the public by causing the death of the chief or head to be published by notice in the Gazette. I now turn to consider s 12 of the Act, which deals with the settlement of disputes of traditional succession to chieftaincy.

[50] Section 12 of the Act deals with the settlement of disputes following a death or removal of a chief or head of a traditional community. The section provides that if a dispute arises amongst the members of a traditional community as to whether or not a certain person should be designated as successor as a chief or head and 'the members of the community fail to resolve that dispute in accordance with the customary law, they (the members of the community) may submit to the minister a written petition, signed by both parties to the dispute, stating the nature of the dispute'.

[51] Sub-section 2 provides that upon receipt of the petition, the 'minister may' appoint an investigation committee to investigate the dispute and report to the minister concerning its findings and recommendations. I interpose to point out that the section does not impose a duty or obligation on the minister to appoint an investigation committee. He or she has an option either to appoint or not to appoint an investigation committee.

[52] Sub-section 3 vests the minister with the discretion upon receipt of the report by the investigation committee to 'take such decision as he or she may deem expedient for the resolution of the dispute in question'. The discretion is subject to the proviso that in doing so the minister shall take into account 'the relevant customary law and traditional practice of the traditional community within which the dispute has arisen'.

[53] I think, I have dealt enough with the relevant provisions of the Act which have a bearing on the dispute of this matter. I now proceed to apply the statutory provisions to the facts of the present matter.

Application of statutory provisions to the facts of the present matter

Who are the parties to the dispute?

[54] The first issue for consideration, as identified earlier, is to consider whether the dispute in this matter is between the two clans or whether is between the two nominees.

[55] It is clear to me that in a case of a succession dispute arising following the death of the chief or head, as in the present matter, the provisions of s 8 apply. The members of the traditional community who are authorised thereto by customary law may designate a person who is a member of that traditional community as chief. Section 8, however does not set out the procedure to be followed in 'the designation' of a person to succeed the chief or head of the traditional community. It would however appear that the phrase 'may designate in accordance with this Act' in s 8(2), intends to convey that the designation is to take place in accordance with the provisions of s 5 of the Act. As has been observed earlier herein, when dealing with relevant provisions of the Act, s 5 provides that if a traditional community intends to designate a chief or head of that community, it shall apply in the prescribed form to the minister for approval to make such designation. Section 1 defines designation, stating that a 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 traditional community recognized under customary law.'

[56] From the foregoing, it follows therefore, in my view that the designation has to take place in accordance with the provisions of s 5 of the Act.

[57] It is common cause in the present matter that, following the death of Chief Angelina Ribebe, the Mwengere and the Mukwahepo clans, who make up the Vakwankora royal family of the Shambyu traditional community, each nominated a person for designation as chief. It is further common cause that as a direct result of the two nominations a succession dispute ensued between the two clans. Earlier in this judgment when I narrated the factual background in paragraphs 10 to 24, I set out the nature of the dispute, namely that the Mukwahepo clan is of the view that the chieftaincy must be given to them through their nominee because their clan had not ruled for more than 75 years. The Mwengere clan, on the other hand, claims that their nominee was nominated by the late Chief Ribebe by means of a verbal 'Will' to succeed her upon her death. The Mukwahepo dispute the validity of such a verbal

Will as being contrary to the traditional law and customary practices of the Shambyu traditional community.

[58] It is further common cause that the erstwhile minister purportedly acted in terms of s 12 of the Act when she appointed an investigation committee. I say 'purportedly' because there appears to be no evidence that a petition as envisaged by the provisions of s 12 was ever submitted by the parties to the minister, on the basis of which the minister commissioned an investigation committee. Ms Kanyetu raised the absence of the petition in her papers but did not challenge the validity of the minister's decision to commission the investigation committee. That notwithstanding, it would appear that the parties accepted that a dispute as envisaged by s 12 exists and the parties further acted in accordance with the minister's decision.

[59] It is further common cause that both clans accepted the appointment of the investigation committee, and co-operated with and participated in the investigation carried out by the committee. In her letter dated 23 January 2017, the erstwhile minister, stated that: 'The Vakwankora family is afforded an opportunity to resolve their royal family succession issue without the involvement of non-Vakwankora family members'. Later in the letter the minister referred to the 'issue' as a 'dispute'. It is further common cause that the two clans acted in compliance with the minister's directions in order to resolve the dispute by holding meetings. It is not in dispute that the last of such meetings was held on 14 December 2014 at the Kayengona tribal office.

[60] The incumbent minister, the arbiter of the dispute, equally accepts that the dispute is between the two clans. In this regard the minister states in paragraph 2 of his opposing affidavit that: 'In the present instance there are two royal family members vying for the Chieftaincy of the Shambyu Traditional Community. Both appear to advance different rules of customary law as to why their preferred successor should be designated as Chief of the Shambyu Traditional Community'. From that statement it is clear, in my view, that from the minister's point of view, as the ultimate arbiter of the dispute, the dispute is between the two clans.

[61] Furthermore, in paragraph 15.1.3 of her opposing affidavit to the main application, Ms Kanyetu, the counter-applicant, says the following: 'Since the Royal Family has failed to designate one person as required, even after a period of four months was given on the recommendation of the investigation committee and in the absence of certain customary law on the resolution of such a peculiar state of affairs and situation, the first respondent as he deemed expedient in terms of s 12(3) was entitled to make the directives he made, including directing that an election takes place under s 5(10)'. The statement is to be read in context. It is to be remembered that the erstwhile minister, following receipt of the report from the investigation committee, afforded the royal family four months to resolve their succession dispute. It is clear that the 'four months' to which Ms Kanyetu is referring to in her affidavit quoted herein is the four months afforded by the erstwhile minister to the Vakwonkora royal family to resolve their succession dispute. The statement in my view, clearly demonstrates that Ms Kanyetu has accepted that the dispute exists between the two clans which make up the Vakwankora royal family.

[62] In my view, it is apparent from the foregoing that the dispute is between the two clans and not between two individual nominees.

[63] It is in my view, further clear from the facts and from the events as they unfolded that all the parties: the minister and the two clans, accepted that they were acting in terms of s 12. As has been observed when I summarised the relevant provisions of the Act, section 12(1)*(b)* provides that 'if a dispute arises amongst the members of a traditional community as to whether or not a person to be designated as . . . successor . . . and the members of that community fail to resolve that dispute in accordance with such customary law, they may submit to the Minister a written petition signed by the parties to the dispute. . . '.

[64] From the foregoing provisions it is transparently clear that s 12 envisages a dispute to be 'amongst members' of the community and not between two persons such as the nominees in the present matter, as contended by Ms Kanyetu.

[65] In view of the conclusion reached in the immediately preceding paragraph, the nominees for designation to the chieftaincy have no standing until one of them has

been formally designated. They are like agents who have been put forward by the clans. It has been held that an agent cannot institute legal proceedings in its own name[4]. Mr Namandje, during his oral submission, correctly in my view, submitted in the context of the completion and submission of the application form to the minister that the person who is to be designated has no *locus standi* to apply for his or her designation. In my view, the issue of *locus standi* does not end with the completion or submission of the application form to the minister but extends to the nominees' standings in bringing this application. In my view, the nominees might qualify as people with substantial interest in the outcome of the proceedings, but I have great doubt whether they have the standing on their own to bring the application without their respective clan members being part of the proceedings. In the present matter the applications for designation were not even submitted by the nominees. In respect of Ms Kanyetu, it is common cause that the application was made by the Chief's Council. In respect of Ms Haindaka, the application was submitted by the Mukwahepo clan. The point of standing has understandably not been raised by either party as both parties are acting in their capacities as nominees. I am not called upon to decide the point and will accordingly leave it for consideration by another court should it be raised in a similar matter.

[66] In the light of the foregoing conclusion, I cannot with utmost respect, agree with the conclusion reached by my brother Parker AJ, and on whose judgment in the *Nguvauva* matter, Mr Namandje so heavily relies to ask for relief in the counter-application. I have earlier found that the dispute is between the two clans and not between the two nominees. In my judgment, the death of Ms Maria Kanyanda did not resolve the dispute between the two clans regarding the rightful or fit and proper person to succeed as the chief of the Shambyu traditional community. The right to nominate a successor vests in the clan and not in an individual. In my view, the Mukwahepo royal clan's right to nominate a successor did not evaporate or disappear with the death of Ms Maria Kanyanda. The Mukwahepo clan's right to nominate a successor survived the death of Ms Kanyanda. The Mukwahepo clan were entitled to nominate Ms Haindaka to replace the late Ms Kanyanda.

---

[4] *Konga Clearing Agencies CC v Minister of Finance* 2011 (2) NR 623 (HC).

[67] Ms Kanyetu did not file an opposing affidavit to Ms Haindaka's application in which an order is sought to remit the matter to the minister for reconsideration. Quite apart from the opposition to the order sought by Ms Haindaka it would appear to me, in the circumstances of this case when I consider the next issue, that such an order would the appropriate one.

Is the counter-applicant entitled to the declaratory order while the minister's first decision still stands?

[68] It is to be remembered that (even though it is not the same person, but the same office) the minister made two decisions; the first decision made by the erstwhile minister was made on 23 January 2017, when she appointed an investigation committee and afforded the royal family four months within which to resolve the dispute. The second decision was made by the incumbent minister on 29 June 2018 when he ordered that an election be held to resolve the succession dispute in the royal family. It is common cause that the parties are all *ad idem* that the minister's decision of 29 June 2018 should be reviewed and set aside. The minister's decision of 23 January 2017, still stands and neither party has applied for it to be reviewed and set aside. I mentioned earlier that Ms Kanyetu asserts in her papers that the minister's decision to appoint the investigation committee was non-compliant with the provisions of s 12 because no petition had been submitted to the minister by the parties before the minister made the decision to appoint the investigation committee. Despite such allegation, Ms Ms. Kanyetu is not asking for an order in her counter-application to review and set aside the minister's second decision. In my view, on the authority of *Oudekraal* (*supra*) the minister's said decision stands unless and until it is reviewed and set aside.

[69] Mr Namandje for Ms Kanyetu referred the court to the judgment of the Supreme Court of Appeal of South Africa in *Teb Properties CC v The MEC for Department of Health & Social Development, North-West*[5]. I have considered the judgment but I do not think it assists Ms Kanyetu's case. In that matter the respondent had filed a counter-application in the court below, which was granted. The SCA held that the appellant's attempt to rely on *Oudekraal* was not of

[5] (792/10) [2011] ZASCA 243 at par 26.

assistance to the appellant. The court reasoned that 'the practical effect of the declarator grated by the court below is that the administrative action that is preceding conclusion of the lease was on force and effect'. Accordingly, it is under those circumstances, illogical to speak of administrative action that is extant as though the declarator issued in relation to the juridical act flowing from the administrative action concerned counts for nothing. In other words, what distinguishes the *Teb* case from the present matter is that there had been a counter-application in the lower court which prevented the implementation of the administrative action. In the present matter there had been no declarator which prevented the implementation of the minister's first decision. As a matter of fact, not only does the decision still stand: it has been implemented. Mr Namandje in the context of the acceptance of the application form by the minister correctly, argued that the only decision that is liable to be reviewed and set aside is the one that have a direct and external legal effect on the citizens. In my considered view, the minister's said decision has a direct legal effect on the Shambyu traditional community, particularly the Vakwankora royal family. In the absence of a court order setting aside the said decision, the minister is under a statutory obligation to make a decision in terms of s 12(3) and (4) of the Act. In the light of this finding the counter-application stands to be dismissed for that reason alone.

[70] I am of the view that, even if the minister's first decision did not stand, the declarator sought cannot be granted. I say this for the reason that it would be impermissible for this court to direct the minister to recognize and approve Ms Kanyetu's designation as Chief of the Shambyu traditional community. For this court to do so would, firstly, amount to usurping the minister's power entrusted upon him by Parliament. Secondly, having regard to the provisions of s 12(3) and (4) which requires the minister when his decision to approve the designation, to take into account the applicable customary laws and practices, this court is not equipped to carry out such a task as it is not vested with the knowledge of customary laws and practices. This constitutes a second reason why the counter-application is liable to be dismissed.

[71] Ms Kanyetu states in her supporting affidavit to her counter-application that the requirements of s 12(1) have not been met in that 'in relation to the purported

dispute between myself and the first respondent there has been no petition, which is the trigger event for the resolution of a dispute in terms of s 12 of the Act'.

[72] It is common cause that Ms Kanyetu is not seeking an order to review and set aside the minister's (first decision) to act in terms of s 12. The minister's decision complained of by Ms Kanyetu is an administrative act. It is trite law that an administrative act stands until reviewed and set aside. (*Oudekraal supra*).

[73] In my view, Ms Kanyetu's counter-application is rather disingenuous and an afterthought. I say that, for the reason that she does not disavow the erstwhile minister's understanding of the dispute as set out in her letter dated 23 January 2017 wherein the minister stated that: 'The VaShambyu dispute is a long outstanding historical succession dispute within the Vakwankora royal family'.

[74] Ms Kanyetu should have immediately pointed out to the minister that the letter misconstrued the fact that the dispute is not 'within the Vakwankora royal family' and informed the minister that the dispute is between her and Ms Haindaka. It has been held earlier in this judgment that the crux of the dispute is between the two clans in that the Mukwahepo clan asserts that it is their turn to rule because they have not ruled for over 75 years, whereas the Mwengere claim that their candidate has been nominated for succession by the late Chief Ribebe through a verbal Will.

[75] A further reason why it cannot be accepted that the dispute is between Ms Kanyetu and Ms Haindaka is the fact that Ms Kanyetu did not herself apply that she be designated as chief. On her own version, it was the Chief's Council of the Shambyu traditional council who applied to the minister for approval that she be designated as a chief. If Ms Kanyetu was not the person who nominated herself, if that had been possible, and furthermore as she was not the applicant, I find it difficult to understand on what basis she can assert that the dispute is between her and Ms Haindaka and not between their clans, the Mwengere clan and the Mukwahepo clan. In my view, what is between Ms Haindaka and Ms Kanyetu is a contest, not a dispute. Both are mere contestants. They are not adversaries: they are not engage in a dispute. It is to be noted that Ms Kanyetu does not describe the nature of the

dispute she claims exists between her and Ms Haindaka, however the dispute between the clans has been fully set out.

[76] It is common cause the minister claims to have acted in terms of s 12 of the Act. I have already found that a dispute in terms of s 12 is a dispute which must have arisen amongst the members of a traditional community. The section does not envisage a dispute between the nominees. The only contention by Ms Kanyetu is that the dispute 'evaporated' or 'disappeared' with the death of the late Chief Ribebe. I have found that the dispute did not 'evaporate' or 'disappear'. In my judgment the dispute is still alive and well and it is still before the minister following the submission by the investigation committee of its report to the minister. The minister is under a statutory obligation to act upon the recommendations of the investigation committee. It is common cause that the incumbent minister attempted to resolve the dispute by resorting to the provisions of s 5(10). It has been found that s 5(10) is not applicable to the facts of the present matter. It would appear to me that the applicable subsections are 12(3) and (4).

[77] I deem it necessary to immediately point out in this connection that the said ss (3) and (4) do not provide a procedure as to how the minister is to arrive at his or her decision. Importantly, the subsections do not state whether the minister is required to observe the *audi alteram partem* rule. In other words whether the minister is required to afford the parties to the dispute an opportunity to make representations before he or she takes a final decision. In my view, that is a relevant consideration which the minister is obliged to take into account.

[78] Mr Nekwaya argues that Chief's Council ceases to exist with the death of the Chief. Mr Namandje argues contrawise. This argument is relevant as to who is authorised to submit the application to the minister for a person to be designated as a chief. Ms Kanyetu's case is that her application was submitted by the Chief's Council. Ms Haindaka's case is that her application was submitted by her clan but was not signed by the Governor as required by the regulations promulgated under the Act. Mr Nekwaya argues that Ms Kanyetu's application is invalid because it was submitted by a non-existent body, the Chief's Council. Mr Namandje, on the other hand, argues that Ms Haindaka's application was a nullity because it had not been

signed by the Governor and furthermore it had not been submitted by the Chief's Council as prescribed by the regulations.

[79] I am of the view that it is inconceivable, if not impossible, that the Legislature would establish two independent bodies for the same traditional community, namely the Traditional Authority and the Chief's Council. Section 2(2) of the Act establishes and vests the Traditional Authority with power or jurisdiction over the members of that traditional community. In terms of s 18 the Traditional Authority has the power to acquire and dispose of movable and immovable property and such other powers as possessed by any juristic person.

[80] The Chief's Council, on the other hand, is in terms of s 9(4) of the Act responsible for the day-to-day administration of the Traditional Authority. The Chief's Council can be compared to a Board of Directors of a company or the Executive Team of a company. This comparison was accepted by the Supreme Court in *Council of Itirelenge Village Community and Another v Felix Madi and Others*[6]. In my judgment, the fact that a chairperson or chief dies does not dissolve the Chief's Council. I would expect that in the event of the death of the chairperson or chief, the normal rules of meetings take effect: That is, that the members of the council in office shall appoint an ad hoc chairperson to preside over the meetings of the Chief's Council until such time that a chief is designated and recognized.

[81] It follows therefore from the aforegoing that the argument by Mr Nekwaya that the Chief's Council ceases to exist following the death of the chief cannot stand. To uphold this argument would result in a state of uncertainty and stagnation in the affairs of affected members of that community, resulting in a situation where there is nobody attending to the day-to-day affairs of that community.

[82] As regards the contention that the application submitted by Ms Haindaka is 'fundamentally flawed, *ultra vires, a nullity and is void ab initio* due to non-compliance with the provisions of the Act in that it had not been signed by the Governor of the Region to verify the information contained in the application as required by regulation 2', has no merit in my judgment, for the following reasons:

---

[6] Case No. SA 21/2016 delivered on 25 October 2017 at para 39.

Firstly, neither s 5 of the Act nor the Regulations stipulates that non-compliance with the said section or the Regulation shall result in a nullity and or the application will be considered as *void ab initio*[7]. Secondly, if regard is had to the information to be verified, namely: the name of the traditional community applying for its chief or head to be designated; the communal area inhabited by that community; the estimated number of that community; the reason for the proposed designation; the name, office and traditional title of the candidate to be designated as chief or head of that community and the customary law of that community, in my view such information, in respect of an already recognized traditional community, would already be in the possession of the minister or at best with the ministry. The information would be relevant and crucial in respect of an application for the designation of a new chief or head as opposed to an application for designation following the death of a chief or head of an already existing traditional community. In any event, it is not in dispute that save for the personal details of Ms Haindaka, the information was previously verified by the Governor when Ms Kanyanda's application was submitted. It is the same information which was previously submitted. Furthermore, it is not disputed that the Governor on whom the Legislature has imposed the duty to verify the information refused to sign the form.

[83] Thirdly, the minister, as the repository functionary, has not taken issue with the fact that the application on behalf of Ms Haindaka for designation has not been signed by the Governor of the Region. It is to be accepted in the circumstances that the minister properly exercised his powers in terms of the section. Even if the minister's act in accepting the application is not an administrative act as contended by Mr Namandje and that it constitutes a clerical act, it is clear on the facts of this matter that following receipt or acceptance of the application, the minister thereafter considered the application and took a decision with external legal effect.

[84] Fifthly, the minister took legal steps, based on the application submitted by Ms Haindaka by recognizing that a dispute properly exists following the submission of the two applications, by appointing an investigation committee in terms of s 12. As pointed out earlier, the minister's decision in this regard stands, and the counter-applicant is not seeking the setting aside of that decision. In fact, Ms Kanyetu, the

[7] *Torbitt v International University of Management* 2017 (2) NR 232 (SC).

counter-applicant, recognized and accepted the minister's decision by participating in the meetings ordered by the minister aimed at resolving the dispute.

[85] Having regard to all the relevant facts, it would appear to me that the counter-application is a case of the proverbial crying over the 'spilled milk'. The application simply does not stand scrutiny.

[86] Taking into account all the foregoing statutory provisions, the facts and all relevant considerations, I have arrived at the conclusion that the counter-application stands to be dismissed.

Conclusion

[87] In view of all the matters considered above, I have arrived at the overall conclusion that: the dispute is between the two clans and not between the two nominees of the clan; the death of Ms Maria Kanyanda did not take away the Mukwahepo's clan's right to nominate a replacement for Ms Kanyanda, as the right to nominate vests in the clan; the minister's decision that a dispute exists in the Vakwankora royal family stands, and the recommendations of the investigation committee are still before the minister who is under a statutory obligation to deal with the dispute as he may deem expedient for the resolution of the said dispute, taking into account the provisions of the Act. In the light of the fact that the finding that the minister's decision still stands and for other reasons stated, the declarator cannot be granted.

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

Main application:

1. The decision communicated to the parties by the minister in his letter dated 29 June 2018 is hereby reviewed and set aside.

2. The matter is remitted to the minister to take such decision as he may deem expedient for the resolution of the dispute between the two clans.

3. The first, second and third respondents are ordered to pay the applicant's costs in the main application, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructed and one instructing counsel.

Counter-application

4. The counter-application is dismissed.

5. The first and second applicants in the counter-application are ordered to pay the respondents' costs, jointly and severally, the one paying the other to be absolved, such costs to include the costs of one instructed and one instructing counsel.

6. The matter is removed from the roll and is regarded as finalised.

_____

H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	E NEKWAYA (with him A SHIMAKELENI) Instructed Appolos Shimakeleni Lawyers, Windhoek
THIRD RESPONDENT:	S NAMANDJE (with him M NTINDA) Of Sisa Namandje & Co. Inc., Windhoek