REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2019/00225

In the matter between:

SALOMON JOSEPHAT WITBOOI	**1ST APPLICANT**
ELIZABETH KOCK WITBOOI	**2ND APPLICANT**
CHRISTINA FREDERICKS	**3RD APPLICANT**
ANNA JACOBS	**4TH APPLICANT**
PENIAS EDUART TOPNAAR	**5TH APPLICANT**

and

THE MINISTER OF URBAN AND RURAL DEVELOPMENT	**1ST RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	**2ND RESPONDENT**
HENDRIK ISMAEL WITBOOI	**3RD RESPONDENT**
SIMON OTTO JACOBS	**4TH RESPONDENT**
WITBOOI TRADITIONAL AUTHORITY	**5TH RESPONDENT**
COUNCIL OF TRADITIONAL LEADERS	**6TH RESPONDENT**
THE ATTORNEY-GENERAL	**7TH RESPONDENT**
THE GOVERNOR OF THE HARDARP REGION	**8TH RESPONDENT**

Neutral Citation: *Witbooi v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00225) [2022] NAHCMD 172 (05 April 2022).

CORAM: MASUKU J
Heard: **05 October 2022**
Delivered: **05 April 2022**

Flynote: Constitutional Law – equality under the law and freedom from discrimination - Administrative Law – Review of decisions by Minister – Legislation – Traditional Authorities Act, of 2000 – designation of chief – whether provisions of s 5 of the Traditional Authorities Act were followed – abdication by decision-maker – whether decision-maker was *functus officio* – Customary Law of the Witbooi clan – whether it is consistent with the Constitution.

Summary: The applicant is a member of the Witbooi royal family and he hails from the matrilineal side thereof. An application was made for his designation as the next Kaptein of the Witbooi clan. At a later stage, the third respondent also made an application for designation as Kaptein. As a result of the two applications that were pending, the Minister of Rural and Urban Development appointed an investigation committee which recommended certain steps taken to be adopted to resolving the dispute of chieftainship. This included an election as a measure of last resort. Another Minister was appointed into office and decided that the best way to resolve the issue was seek an opinion from the Attorney-General. That opinion took the position that the customary law of the Witbooi clan did not allow for a member of the family to be appointed as Kaptein if that member hailed from the maternal side of the royal family. It was on that basis that the applicant was disqualified by the Minister, he opting instead, to approve the designation of the third respondent. The designation was eventually recognised by the President, who caused a Government Gazette to be issued the third respondent's designation. Dissatisfied with this decision, the applicant approached the court on review, seeking that the decision by the Minister and such further steps taken thereon, be reviewed, and set aside.

Held: that there is a difference between a traditional authority and a traditional council. An application for approval of designation by the Minister must be made by the traditional council or the chief's council, in terms of s 5(1) of the Act. In this regard, the Traditional Authority has no role.

Held that: the Minister in this case, abdicated his decision-making powers by adopting the Attorney-General's opinion lock, stock and barrel. This, the court found, was impermissible abdication of responsibility and was thus liable to be set aside on that score.

Held further that: since the previous Minister had taken a decision, which included that an election was to be held, it was not open to the succeeding Minister, to take a fresh decision. Such new decision was thus unlawful as he had become *functus officio* in that particular regard.

Held: that although it is unnecessary for the court to determine whether the customary law of the Witbooi clan does not allow offspring from the matrilineal side of the royal family to become successors and for females to ascend to chieftainship of the clan, it is however obvious that the disqualification of the applicant from assuming chieftainship was in violation of Art 10(1) and (2) of the Constitution.

ORDER

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1. The decision taken by the Minister of Urban and Rural Development ('the Minister), on 23 April 2019, alternatively on 22 May 2019, approving the application for the designation of Mr. Hendrik Ismael Witbooi ('Third Respondent'), and in terms of which the Third Respondent was designated as the Kaptein of the Witbooi (/Khowese) clan is hereby reviewed and set aside.
2. All the processes and/or steps taken following the Minister's decision, and in particular the following steps be and are hereby set aside:
    2.1 the First Respondent's notification of his decision to the President in terms of section 6(1) of the Traditional Authorities Act, 2000;

2.2 the President's recognition and designation of the Third Respondent as the Kaptein (Chief) of the Witbooi (/Khowese) clan by way of proclamation in the Government Gazette on 15 August 2019.

3. The First, Third, Seventh and Eighth Respondents be and are hereby ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructed and two instructed legal practitioners.
4. Such costs shall, to the extent applicable, be subject to the provisions of Section 17 of the Legal Aid Act, No. 29 of 1990.
5. The matter is removed from the roll and is regarded as finalised.

JUDGMENT

MASUKU, J:

Introduction

[1] The legal question presented for determination by this court relates to a decision taken by the Minister of Urban and Rural Development to designate Mr. Hendrik Ismael Witbooi as the Chief or Kaptein of the Witbooi Clan.

[2] The applicants approached this court, seeking in the main, an order reviewing and setting aside that decision for the reason that it is in conflict with the provisions of the Traditional Authorities Act, No. 2 of 2000 ('the Act'), and was in any event, unreasonable, irrational, discriminatory and unconstitutional.

[3] The application is opposed by both the Government respondents, being the first, seventh and eighth respondents and third respondent as well. The basis of the application and the opposition will be adverted to as the judgment unfolds.

Amended (Augmented) notice of motion

[4] It is perhaps important to mention that the applicant applied for the amendment of the notice of motion, which does not appear to have been opposed. Ultimately, the relief sought by the applicant was the following:[1]

'1. Reviewing and setting aside the decision taken by the 1st Respondent on 23 April 2019, alternatively on 22 May 2019, to approve the designation application of the 3rd Respondent in terms of whereof the 3rd Respondent was designated as the Kaptein (Chief) of the Witbooi (/Khowese) clan ('the decision').

2. Alternatively, declaring that such decision is null and void for being in conflict with Article 1 and 18 of the Namibian Constitution.

3. Reviewing and setting aside all further processes and/or steps flowing from this aforesaid decision, in particular:

3.1 the 1st Respondent's notification to the 2nd Respondent (in terms of section 6(1) of the Traditional Authorities Act, 2000) of his decision;

3.2 the 2nd Respondent's recognition (in terms of section 6(2) of the Traditional Authorities Act, 2000 of the designation of the 3rd Respondent as the Kaptein of the Witbooi (/Khowese) clan by way of proclamation in the Gazette on 15 August 2019.

4. Declaring (insofar as it may be necessary) that Regulation 2 of the Regulations published by the 1st Respondent is ultra vires, to the extent that it sets peremptory requirement(s) for the validity of an application in terms of section 5 of the Traditional Authorities Act, 2000, which requirement(s) are in conflict with section 5 read with section 19 of the same act (*sic*).

5. That the 1st Respondent, and any other respondents that will oppose this application, shall pay the costs of this application, which costs shall include the costs of one instructed and two instructed counsel.

6. Further and/alternative relief.'

The parties and their representation

[1] Amended (Augmented) notice of motion dated 30 September 2020, p 569 – 571 of the record of proceedings.

[5] The first applicant is Mr. Salomon Josephat Witbooi, an adult male of Gibeon, in the Hardap Region of this Republic. He is a member of the Witbooi royal house and was nominated for designation as Chief of the Witbooi Clan.

[6] The second applicant is Ms. Elizabeth Kock Witbooi, an adult Namibian female who resides in Mariental. She is also a member of the Witbooi royal clan. The third applicant is Ms. Christina Frederick, an adult Namibian female who resides in Windhoek. She is also a member of the Witbooi royal clan. The fourth applicant is Ms. Anna Jacobs, an adult Namibian female resident in Gibeon. She is also a member of the Witbooi royal house. The fifth applicant, on the other hand is Reverend Penias Eduart Topnaar, a resident of Gibeon and a member of the Witbooi royal clan.

[7] The first respondent is the Minister of Urban and Rural Development and he is cited in his official capacity as the official responsible for designation of chiefs in terms of the Act. The second respondent is the President of the Republic of Namibia. He is elected in terms of Article 28(1) of the Constitution and is empowered by the Act to recognise a chief of any traditional community. He is cited in these proceedings by virtue of the powers vested in him by the Act.

[8] The third respondent is Mr. Hendrik Ismael Witbooi, a Namibian adult male. He is a member of the Witbooi royal Clan and is the person that was designated by the first respondent as Chief of the Witbooi clan. The fourth respondent is Mr. Simon Otto Jacobs, an adult Namibian male, who is a member of the Witbooi Traditional Authority but is not a member of the Witbooi royal clan.

[9] The fifth respondent is the Witbooi Traditional Authority, a duly promulgated traditional authority in terms of the Act. The sixth respondent is the Council of Traditional Leaders, a Council established in terms of the provisions of s 2 of the Act. The Council is cited in these proceedings for any interest it may have in the relief sought. The last two respondents, being the seventh and eighth respondents are the Attorney-General and the Governor of the Hardap Region, respectively. They are not dealt with at all in the founding affidavit.

[10] The parties will be referred to using the appellations mentioned above. Having said so, however, the first applicant will be referred to as ‘the applicant. Where reference to another applicant is made, the said applicant will be precisely identified. The Minister, the President and the Attorney-General will be referred to as such. The Governor of the Hardarp Region will be referred to as ‘the Governor’.

[11] I should, as a matter of house-keeping, also mention that the words ‘Chief’ and ‘Kaptein’, in reference to the chieftainship of the Witbooi traditional community, shall be used interchangeably in reference to the person occupying the office of chief as envisaged by the Act.

[12] The parties were represented as follows: Mr. Tötemeyer, represented the applicants. The first, seventh and eighth respondents were represented by Mr. Ketjijere, whereas Ms. Kahengombe represented the third respondent. The court is indebted to all counsel for the assistance they rendered to the court in dealing with this matter.

Background

[13] The background giving rise to this application, which is not seriously disputed may be briefly summarised as follows: the main protagonists, except the Minister, are members of the Witbooi royal house. It would appear that the late Dr. Hendrik Witbooi was nominated and designated as the chief of the Witbooi clan. Because of his appointment as a Minister, he took leave of absence and a temporary chief, in the name of Mr. Christian Rooi, was appointed in 1994.

[14] It would appear that the position of chief of the Witbooi clan fell vacant. This was in 2015, when Mr. Rooi ascended to the celestial jurisdiction. As a result, it would seem that two persons were identified by rival clans of the Witbooi royal family as deserving of designation. These were the first applicant and the third respondent. The two are related in that they are cousins. The first applicant’s mother and the third respondent’s father were siblings and therefor members of the Witbooi royal house.

[15] It is a cold fact that the issue of designation served before the Minister, who in the end, designated the third respondent as the chief of the Witbooi traditional community. It is that designation that has sparked the present controversy. A number of irregularities are alleged to have been committed by the Minister in eventually designating the third respondent. Among other issues is the contention that the applicant was found to be unfit for designation because he hails from the matrilineal part of the royal family and does not qualify therefor as the clan is patriarchal in orientation.

[16] The ultimate question for determination, as foreshadowed elsewhere above, is whether the applicant is correct in contending as he does, that the designation of the third respondent was in contravention of the Constitution and the applicable law. His bases for those contentions will be addressed below.

The applicant's case

[17] It is the applicant's case that he was nominated by the authorised members of the clan to be the next chief of the royal house. This nomination was duly notified to members of the Witbooi Traditional Council by the fifth applicant. The Traditional Council then held a meeting in which they endorsed the nomination of the applicant and in that regard, filed a resolution dated 7 October 2015.[2]

[18] It is the applicant's further case that the Council signed his application designation and authorised the fifth applicant to submit it to the Governor for onward transmission to the Minister. This was done. The applicant points out that his application for designation was not, however, submitted to the Minister immediately but only after the third respondent had also filed his application for designation.

[19] Having received both applications for designation, namely that of the applicant and the third respondent, the Governor then submitted both applications to the Minister for consideration. The Minister, in view of the two applications set up an investigation committee purportedly in terms of s 12 of the Act with a view to

[2] Page 198 of the record of proceedings.

settle the chieftainship dispute.[3] I use the words purportedly for the reason that the applicant challenges the correctness of the resort to s 12 by the Minister and wishes the court to set aside that decision as inconsistent with the Act.

[20] The investigation committee established by the Minister made certain recommendations to the Minister. These included the following:

(1) that the royal house should resolve its own royal succession without the involvement of non-Witbooi royal house members;
(2) in the event there is no consensus reached on the issue, assistance should be sought from the Nama Traditional leaders' association under the aptitude of the Governor;
(3) the succession dispute should be resolved and finalised within a period of four months from the date of receiving the letter on the outcome of the investigation;
(4) should the dispute not be resolved within four months, an election must be held as a measure of last resort, to select the next Kaptein; and
(5) both candidates i.e. the applicant and the third respondent, qualify for designation as they are from the royal house, with one from the maternal and the other from the paternal side.

[21] It is the applicant's case that the dispute alleged should not have been declared because he was nominated by the authorised members of the royal house, yet the third respondent was nominated by a Mr. Johannes Richter, who is not an authorised member of the royal house. It is the applicant's case that for this reason alone, the nomination and application of the third respondent does not meet the requirements of the Act, especially s4(1)(*a*) and 8(2), thereof. For this reason, the third respondent's application could not in law form the basis for a dispute and could not attract the invocation of s12 of the Act.

[22] It is the applicant's further case that there was no need to invoke the provisions of s12 of the Act in this case. In this connection, if the Minister had any reservations regarding the applicant's application, he should have invoked the

[3] Page 183, letter from Minister Shaningwa to the fifth applicant dated 14 December 2017.

mechanism provided in s 5(1) (*vii*) read with s19 (*j*). As such, it is the applicant's case that the Minister did not have the right in law to unilaterally declare a dispute merely because he had received two applications for designation.

[23] The applicant further contends that the first respondent's decision to approve the designation of the third respondent violates the right of the authorised members of the royal house to nominate a candidate for designation as chief or Kaptein of the Witbooi traditional community. On the above stated grounds, the applicant moves the court to review the Minister's decision.

[24] The applicant proceeded to indulge into the Witbooi customary law, which is applicable to this situation. In this connection, the applicant proceeds to state the applicable customary law and his own credentials, which he claims, render him eminently suitable to inherit the office of Kaptein of the traditional community.

[25] During the hearing of the urgent application in 2019, I pointed out to Mr. Khama, who then appeared for the applicants, the uncomfortable situation where a person in the applicant's position, deposes to what he, an interested party, claims is the customary law of succession within the Witbooi clan. The normal position, it would seem to me, is that the person who brings the evidence must be independent and impartial and more importantly, be an expert in that customary law. This is so because it is tried law that customary law must be proved as a fact.

[26] Happily, Mr. Tötemeyer did not, in his address, as I listened to him, lay much store on this aspect of the case. I will accordingly proceed to deal with the further bases upon which the applicant sought the court to exercise its review powers in the instant case. I proceed in that connection below.

[27] The applicant further punches holes in the decision of the Minister. In this regard, the applicant refers to a letter signed by the Minister, dated 23 April 2019.[4] In that letter, the Minister discloses that in a bid to find a solution to the Witbooi impasse, he sought and obtained a legal opinion from the Attorney-General.

[4] Page 186 of the record.

[28] In the valedictory parts of his letter, the Minister then discloses what the legal opinion is. He states thus:

'15. It was concluded that the designation of a *Kaptein* as envisaged by the Nama Customary Law and specifically in accordance with the /*Khowesen* (Witbooi) Customary Law follows the patrilineal lineage and there are no facts and evidence submitted to advance the proposition that a new community practice of maternal lineage has superseded the paternal lineage which was the practice, in which the new practice would be the applicable customary law.

16. It was advised that the Candidate who descents (*sic*) from the paternal lineage is the only candidate that complied with the /*Khowesen* Customary Law of succession.

17. After a careful exposition of the legal opinion, it is these considerations that lead me to conclude in search for an answer that, "the only rightful candidate who complies with the /*Khowesen* Customary is Mr. Hendrik Ismael Witbooi who descents (*sic*) from the paternal lineage.'

[29] It was accordingly submitted, in view of the foregoing events that the Minister did not act reasonably and impartially in dealing with this matter. It was argued that he acted irrationally in that he abdicated his discretion and substituted his decision for that of the Attorney-General.

[30] Tied to the issue of abdication was a contention by the applicant that because of the advice of the Attorney-General that the Minister adopted and followed, he made a decision that was unconstitutional in that it is discriminatory and violates the provisions of Art 10 of the Constitution. This is because in terms of the Minister's decision, the applicant was disqualified on the basis that he was born of the matrilineal line, which was a disqualifying factor for him. The third respondent qualified only on the basis that he was an offspring of the patrilineal line, meaning that it discriminated against those members who are offspring of the female lineage for no other reason than that fact.

[31] The applicant further accused the Minister of bias in the manner that he handled the matter and in particular, dealt with the applicant. The applicant took

the view that the Minister was openly biased against him and favoured the third respondent. In support of this, the applicant attached a letter of complaint written by the applicants to the President.[5]

[32] The applicant further takes issue with the third respondent's application for designation. He makes the point that the respondents approached the matter from a wrong legal premise, namely that it is the Traditional Authority that should have made the application for designation of the third respondent. It is the applicant's position that the approach by the respondents was wrong in that it contravened the provisions of s 5(1)(*a*) of the Act.

[33] The applicant further took issue with the Minister's actions and alleged that Minister Shaningwa, the former Minister of Rural and Urban Development, had taken a decision that the Witbooi royal house should agree on one candidate for designation as the Kaptein of the clan. The applicant deposes that in line with the directive from Minister Shaningwa, the clan met and decided to withdraw the third respondent as a candidate thus leaving the candidature of the applicant unopposed. It is alleged in this connection that the Minister was bound by the decisions of his predecessor and was not at large to rule as he did as the third respondent's candidature had been withdrawn. He was thus *functus officio*, resulting in his decision being liable to be reviewed and set aside by this court.

The Minister's case

[34] In his answering affidavit, the Minister disavows all the claims by the applicant in the founding affidavit. It is his case that he acted in terms of the law in acting as he did. In this first place, he contends, that he was at large to appoint an investigation committee in terms of s 12 of the Act because there were rival candidatures to the chieftaincy. In this connection, Mr. Richter declared a dispute in terms of s 12 which necessitated the formation of the investigation committee.

[5] Page 217 of the record being a letter from the Office of the Witbooi Royal House to the President dated 23 April 2019.

[35] It is the Minister's further case that the said committee was assembled by his predecessor and all the parties participated in its deliberations without demur and they co-operated in its mission. When its recommendations could not yield a positive outcome, it was incumbent on him to try to resolve the dispute.

[36] In doing so, the Minister states that he called the warring parties and held two separate meetings with them in Mariental at the Governor's office on 20 June 2018. It is at that time that he also requested an opinion from the Attorney-General. He states that after applying his mind to the two applications submitted to him, 'I made a decision to approve the application to designate Mr Ismael Witbooi as the Chief of the Witbooi Traditional Community.'[6] This, he states, was on 22 May 2019.

[37] The Minister accordingly denied that the decision he made was not rational. He deposed that he satisfied himself that all the relevant provisions of the Act had been complied with. He further states that his decision is valid unless set aside by the court.

[38] Regarding the application for the designation of the third respondent, the Minister deposed that the Traditional Councillors are authorised to make the application for designation where a Traditional Authority exists in that community. It was his case that the Witbooi Traditional Community is recognised in terms of the Act and that the said Traditional Authority authorised the third respondent to apply for designation as chief of the Witbooi clan.[7] This assertion is repeated in paragraph 104.4 of the Minister's affidavit.

[39] The Minister further asserted that the fourth respondent, Mr. Jacobs is a duly gazetted Traditional Councillor and is therefore authorised in terms of s 5(1) (*a*) and (*b*) to apply for the designation of the third respondent. He denied that the royal house has any right to nominate a candidate for designation as chief of a traditional community.

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[6] Para 20 of the Minister's answering affidavit, p 255 of the record of proceedings.
[7] Para 99.3 of the Minister's answering affidavit, p 272 of the record of proceedings.

[40] Regarding the *functus officio* argument, the Minister took the view that the review is premised on the decision of former Minister Shaningwa, whose decision regarding the resolution of the dispute, had lapsed. The Minister asserted that the recommendations of the investigation committee, as ordered by the former Minister had a life span of six months. By the time Minister Mushelenga designated the third respondent, the decision by Minister Shaningwa was invalid. This, he contends, does not render his decision *functus officio*.

[41] The Minister accordingly moved the court to dismiss the application for review, arguing in the main that he complied with the relevant law and properly applied his mind to the matter before him. As such, none of the conduct alleged to be reviewable by the applicants holds any water.

The third respondent's case

[42] The third respondent, in his answering affidavit, also opposed the granting of the application for review. He deposes that the succession to the chieftainship was intertwined with the leadership of the AME Church. In this connection, he was requested, by the applicant, amongst others, to renounce his membership of the new AME Church and join the AME Church. This renunciation, it was stated, would open the way for the third respondent to become the Chief of the Witbooi Traditional Community.

[43] It is the third respondent's case that after he resisted the attempts to have him renounce his membership of the new AME Church, as aforesaid, he was informed that the applicant would be considered for chieftainship. In this regard the applicant informed the third respondent during a meeting held in Gibeon on 26 December 2011 that they are going to convene a secret meeting and will communicate the result, which was that the applicant be considered for chieftainship.

[44] The third respondent denied that the lineage is matrilineal. It was his assertion that where a female had been at the helm, it was for purposes of

regency, when a minor Kaptein was not yet of age to assume the chieftainship. The third respondent, who was limited in his response to the allegations by the applicant, moved the court to stand by the result of the investigation committee and the opinion of the Attorney-General that he is the only eligible candidate for designation as Kaptein of the Witbooi traditional community.

[45] The third respondent further asserted that the applicant is in an invidious position, not only because he comes from the maternal side of the lineage, which disqualifies him from being designated but also because he was born out of wedlock. A chief, asserts the third respondent, according to the Witbooi custom, should not be born out of wedlock. The third respondent repeats that he is the only rightful successor to the chieftainship as he is a direct descendant of the patrilineal side of the royal family.

[46] That, in a nutshell, is the basis of the third respondent's opposition to the granting of the application. He raises other issues in his papers, briefly but which are not necessary to traverse for the purposes of deciding this application.

[47] Having briefly outlined the cases of the various parties, it is now opportune to deal with the legal issues arising, head-on. In this connection, it may be necessary to first sketch the key and relevant legal provisions of the Act that will have a bearing on the decision of the matter at hand. I proceed to do so below.

The statutory scheme

[48] Designation is a process that is defined in the Act. Section 1 defines it as 'in relation to the institution of chief or head of a traditional community, includes the election or hereditary succession to the office of a chief or head of a traditional community, and any other method of instituting a chief or head of a traditional community recognised under customary law.'

[49] It can be described as a means by which a chief or head of a traditional community is ushered into the office of a chief or head of a traditional community.

It includes an election, or succession by a person to the office of chief or head of a traditional authority recognised under customary law.

[50] The provision that deals with designation is s 4, which reads as follows:

'(1) Subject to sections 5 and 6, members of a traditional community who are authorised thereto by customary law of that community, may designate in accordance with that law –

(a) one person from the royal family of that traditional community, who shall be instituted as the chief or head, as the case may be, of that traditional community; or

(b) if such community has no royal family, any member of that traditional community, who shall be instituted as head of that traditional community.

(2) The qualifications for designation, and the tenure of, removal from and succession to the office of chief or head of a traditional community shall be regulated by the customary law of the traditional community in respect of which such chief or head of a traditional community is designated.'

[51] What becomes clear from the above provision is that there are two types of traditional communities acknowledged by the law. There are those which have a royal family and those without one. Where there is a royal family, the members of that traditional community may designate one person from the royal family to be instituted as chief. If there is no royal family, any member of the traditional community, may be instituted as head of that traditional community.

[52] It is clear in the instant case that the Witbooi traditional community has a royal family. Accordingly, it is the members of that traditional community that may, in accordance with their customary law, designate one member of the royal family to be instituted as chief. The qualifications for designation. Succession and removal from the office of chief, are determined by the customary law of the Witbooi traditional community.

[53] Section 5 of the Act, on the other hand, provides as follows:

'(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 customary law of that community,

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

[54] It would appear that designation is done and becomes choate when two levels have been followed. The first is at the traditional community level. At this stage, members of that traditional community who are authorised by the customary law of that traditional community designate, in this case, one person from the royal family, to be chief of the traditional community, per s 4(1)(*a*).

[55] The next step is the approval of the designation by the Minister in terms of s 5 of the Act. In that regard, it becomes the duty of the Chief's Council or the Traditional Council to apply to the Minister on the prescribed form, to approve the designation of the chief of that traditional community. It is not necessary for present purposes, to consider the information that must be provided in the prescribed form.

[56] In the instant case, it is submitted that the approval of the designation of the third respondent was fatally defective and should, for those reasons, be set aside on review. The basis for that proposition has been dealt with earlier in the judgment.

[57] There is one point that the applicant makes in his heads of argument and it is this – the respondents proceed from a wrong legal premise in terms of the approval of the designation. In their papers, it is clear that it is the Traditional Authority that made the application for approval of the designation of the third respondent. This is evident from a letter dated 13 May 2019, entitled, 'Succession Application'.[8]

[8] Letter from Witbooi Traditional Authority, p. 522 of the record of proceedings.

[58] It is plain that the said letter carries the letterheads of the Witbooi Traditional Authority. Furthermore, the letter is signed by the 4th respondent in his capacity as the Senior Councillor of the Traditional Authority and head of administration. The said letter recommends the recognition of the third respondent as Kaptein of the Witbooi traditional community.

[59] I am accordingly in complete and unqualified agreement with the applicants that the application for approval of the third respondent was not done in terms of the provisions of the Act. This is so because it is the wrong body that made the application for approval of the designation of the third respondent. It is clear, from what is stated above, that the appropriate body to make such an application, in terms of s 5(1)(*a*) of the Act is the Chief's Council or the Traditional Council established in terms of s 8 of the Act.

[60] I am of the considered view that where the application for approval of designation has been made by a body not authorised to so do by the Act, such application is defective. Accordingly, any approval made by the Minister on the basis of an application made by a body not empowered by law to do so is plainly unlawful and cannot bring about legal consequences. I am of the considered view that the designation of the third respondent is, on this very basis a nullity and thus bound to be set aside.

[61] In terms of the Act, a Traditional Authority and a Traditional Council are two separate bodies endowed with separate and distinct powers and functions under the Act. In this case, the respondents appear to have dealt with a wrong body in law, namely, the Traditional Authority when it should have been the Traditional Council that made the application for approval of the designation to the Minister. The powers and functions of the two bodies cannot be exercised interchangeably.

[62] In order to drive the point home, it is necessary to recall what the Minister said in his answering affidavit. At para 99.3, p 272, the Minister states the following in part:

'I submit that the Witbooi Traditional Authority is a recognised traditional authority in terms of the Traditional Authority Act and thus authorised Mr. Simon Otto Jacob to make an application for designation of the Chief for the Witbooi clan.'

[63] It is accordingly clear that even the Minister misinterpreted or overlooked the provisions of the Act and found that he was entitled to receive and consider an application from the Witbooi Traditional Authority and not from the Witbooi Traditional Council. As such, I agree with Mr. Tötemeyer that the application before the Minister was a nullity in view of the notorious fact that it was brought by a body not authorised by law. The Minister ought to have rejected that application, it being made by an unauthorised body in violation of the clear and unambiguous provisions of the Act.

[64] The correctness of Mr. Tötemeyer's submission in this regard cannot in good conscience, be gainsaid. I say so when one has regard to what the law prescribes and what actually happened in this case. All said and done, it becomes clear that the application for the approval of the third respondent's designation was not authorised in terms of the Act. The Minister's approval thereof is accordingly a nullity. The applicants' application, in my considered view, must succeed.

Grounds for review

[65] To the extent that I may have erred in the conclusion I reach in the immediately preceding paragraphs, I am of the considered view that out of the abundance of caution, some of the arguments advanced by the applicants in support of the application for review should be addressed. It may not be necessary to address them all. I proceed with that exercise below.

Functus Officio

[66] It was submitted by Mr. Tötemeyer that the Minister was *functus officio* at the time that he approved the designation of the third respondent in 2019. This is because Minister Shaningwa, the then Minister, in 2017 adopted the

recommendations of the investigation committee. The last of the action that needed to be taken, was an election, as stated in para 19 of this judgment.

[67] It needs to be stated that elections are in fact recognised by the Act. Section 5(10) of the Act provides the following:

> '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 the meeting.'

[68] There is no dispute that the election mode was never engaged in although it had been adopted by Minister Shaningwa. Instead of following through on the recommendations by the committee, Minister Mushelenga, who assumed office after Minister Shaningwa left office, decided to hold a consultative meeting separately with the rival factions. That did not bring resolution to the issue.

[69] The Minister then sought the famous opinion from the Attorney-General, which he employed to decide the dispute in the third respondent's favour. The argument by Mr. Tötemeyer is that the Minister had become *functus* at that time and it was not open to him to re-open the issue by seeking and eventually invoking the opinion of the Attorney-General. The issue had been dealt with by Minister Shaningwa and all the recommendations had to be followed through to the end, which would have culminated in an election.

[70] Ms. Kahengombe, for the respondent agreed that the Minister had become *functus officio* for the reasons stated above. Her only gripe was that the court is not obliged in every case, to set aside the decision that is made when the maker had become *functus*. The court has a discretion and may exercise it against setting aside the said decision. In this instance, it was argued that the interests of

justice do not favour the setting aside of the Minister's decision, including that the decision was made four years ago. Must Ms. Kahengombe's entreaties carry the day in this case?

[71] I am of the view that this is a case where the Minister was *functus officio* and his office had fully and finally exercised its discretion. He had no lawful reason to revisit and thus reopen the issue. It would be a travesty of justice in such instances, to let a decision, which the Minister had no power to make when he did, to stand. This is especially so when the decision appears to run counter to the relevant law and more particularly, the Constitution, as will be apparent later.

[72] In *Pamo Trading*[9] the Supreme Court expressed itself on the doctrine of *functus officio*. It again had a later opportunity to do so in *Hashagen*,[10] where it expressed in the following terms:

'[27] An administrative decision is deemed to be final and binding once it is made. Once made, such a decision cannot be re-opened or revoked by the decision-maker unless authorised by law, expressly or by necessary implication. The animating principle for the rule is that both the decision-maker and the subject know where they stand. At its core, therefore, are fairness and certainty.

[28] As Pretorius aptly observes:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

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[9] *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) 834 (SC).

[10] *Hashagen v Public Accountants and Auditors Board* SA 57/2019 (delivered on 5 August 2021).

[29] What this means then is that once an administrative body has exercised an administrative discretion in a specific way in a particular case, it loses further jurisdiction in the matter. It cannot go back on it or assume power again in respect of the same matter between the parties.'

[73] It appears that there are very few and circumscribed circumstances in which a decision-maker can be allowed to revisit or reopen his or her decision. This would be in circumstances where the law expressly provides that unusual avenue or where it impliedly allows a second bite to the same cherry.

[74] There is no authority cited for the proposition that the court, even where it is accepted that the principle of *functus* applies, may still overlook same and proceed to deal with that new decision as one that stands. I am certainly not persuaded by the argument advanced, in any event, that this is a case where the court can rake the bold step of allowing a decision-maker to have a second bite to the cherry and move on with the matter on that premise.

[75] In view of the aforegoing, I incline to the view that the point of *functus* was well taken as conceded by the Minister. There is, however, no proper basis in law for the court, notwithstanding the violation of the *functus* principle, to deal with the matter as though the principle was not violated. This serves as another basis for setting the Minister's decision aside.

[76] I should perhaps mention that the fact that another Minister, who occupied the office took the previous decision, does not mean that a successor Minister, merely because he or she is a different person, is at large to change or re-open that decision. This is so even if the latter correctly holds the view that the predecessor's decision was wrong in law. It is the office and not necessarily the person of the occupier of that office, that makes the decision.

Alleged abdication by the Minister

[77] The applicant, in this connection, argued that the Minister did not apply his mind to the application for approval of the designation of the candidates before

him. It is submitted that the Minister simply abdicated his duties, to consider and properly apply his mind to the rival applications to the Attorney-General. The material part of the Minister's decision is quoted in para [27] above. There, he says that he considered the opinion of the Attorney-General, which suggested that the applicant must be disqualified because he is a descendant from the matrilineal side of the Witbooi royal house.

[78] I am of the view that it is clear that the Minister did not, on the evidence before me, and having regard to the decision he made, quoted in para [27], that he did not personally apply his mind to the merits of the applications before him. All he did, was to adopt the legal opinion of the Attorney-General and he says so. What he considered was the Attorney-General's opinion and merely regurgitated it as his decision for approving the designation of the third respondent.

[79] I am of the considered view that this was an impermissible abdication of the powers imbued to the Minister by the Act. A legal opinion is just that – an opinion. It does not become Gospel truth so to speak, nor does it constitute law or authority of whatsoever nature. What cannot be gainsaid is that other people, when granted the opportunity, may have placed a different perspective from that of the Attorney-General, which may have possibly persuaded the Minister otherwise. He simply adopted the Attorney-General's opinion and that became his decision.

[80] It may have been a different story if the Minister had made the legal opinion available to the applicants and informed them of his *prima facie* view and afforded them an opportunity to obtain their independent advice. They may have been able to obtain a different legal opinion, which may have been able to sway the Minister's wholesale adoption of the Attorney-General's opinion. That he did not do so, in my view amounts to him having abdicated his powers and duties under the Act.

[81] It provides trite learning that what may at first blush, appear as an open and shut case, may when a moment to be otherwise persuaded is afforded, turn out to be the direct opposite of the initial impressions. In *John v Rees; Martin v Davis*[11]

[11] *John v Rees; Martin v Rees; Rees v John* [1970] CH 345 [1969] 2 All ER 274 at 402.

Sir Robert Megarry made the following remarks in deciding a case about a Labour Party meeting that had been abandoned in disorder and his words resonate with the issue under discussion. He said:

> 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered change.'

[82] It accordingly goes without saying that the reliance by the Minister, solely on the opinion of the Attorney-General amounts to abdication and more, because had he afforded the applicants an opportunity to take legal advice and make submissions on what appeared to the Minister, to have been an unanswerable case made in the legal opinion, may well have been answered and to the Minister's persuasion, in which case, he may have arrived at a different outcome on the propriety of following the legal opinion rendered to him.

[83] In view of the considerations and observations made above, I am of the view that the Minister's decision to adopt the Attorney-General's opinion *holus bolus,* amounted to an impermissible abdication of responsibility and thus renders the decision irrational and unreasonable. As a result, I am of the considered opinion that the applicant's case on this score is unassailable and should succeed.

[84] The fallacy of the approach adopted by the Minister, in accepting and adopting the Attorney-General's opinion lock, stock and barrel, becomes more pronounced when consideration is given to the alternative argument by the applicant, namely, that the Minister's decision is unconstitutional and discriminatory. Another opinion may have made the Minister alive to that possibility. He however chose to abide by the legal opinion provided to him and made it his own. I deal with the constitutionality argument below.

Was Minister's decision discriminatory and unconstitutional?

[85] What is plain from the Minister's decision, is that he took the position, influenced and guided of course by the legal opinion rendered to him, that the applicant was liable to be disqualified because, in terms of the Witbooi customary law, persons eligible to be successors to the chieftainship should have come from the patrilineal lineage. Because the applicant hails from the matrilineal lineage, he was, for that reason and no other, considered ineligible for the office of Kaptein. This view was in line with the Attorney-General's opinion.

[86] The applicant claims that the Witbooi or */Khowese* customary law, endorsed by the Attorney-General as being applicable, to this effect, is unconstitutional and discriminatory. This, it was submitted, is because it violates certain provisions of the Constitution. I deal with that issue presently.

[87] Article 10(1) and (2) of the Constitution read as follows:

> '(1) All persons shall be equal before the law.
>
> (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic class.'

[88] I digress, before dealing with the constitutional provisions quoted above and point out that the applicants and the respondents do not agree on the applicable custom regarding succession to chieftainship. The applicants claim that there have been female Kapteins in the past, whereas the respondents dispute this vehemently. The applicants' position questions the correctness of the respondents' assertion that ascension to chieftainship in the Witbooi community follows the patrilineal line only. There is however no need to resolve that dispute by reference to oral evidence as it can, in my view, be resolved on the respondents' papers as they stand.

[89] I now revert to the provisions quoted above. The equality clause tells us that all people, without exception, despite their differences, which might be apparent, shall be equal before the law. This includes men and women. It would appear, regard had to the customary practice in this case, assuming that the respondents'

case is an accurate account of the relevant customary law, namely, that men and women are not treated equally, when it comes to issues of succession to the office of the Kaptein. This is because the customary law, as the respondents have it, leans in favour of men and against women.

[90] In that regard, men and women are not treated equally in the assumption of the office of Kaptein. The respondents' position is that where women are allowed to assume the chieftainship, it is only as regents, pending the ascension to the throne by a member from the patrilineal side of the royal family. They cannot be Kaptein in their own right as descendants of the matrilineal side of the royal family. It then is clear to me that the custom, in this regard, gives different treatment to men and women, based on their sex, thus violating the constitutional imperative of equality before the law.

[91] Article 10(2), on the other hand, prohibits discrimination on the grounds quoted above. I am of the considered view that the Witbooi customary law in this connection is discriminatory against women in that where a candidate is born from the royal house, he or she can be disqualified from being Kaptein for no other reason than that he or she is an offspring from the matrilineal line of the royal family. This is clear discrimination that the Constitution cannot countenance.

[92] On the other hand, Article 66 if the Constitution reads as follows:

'(1) Both the customary and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other law.'

[93] It is abundantly clear, without deciding the issue directly, that from what I have stated above that the customary law of the Witbooi clan, on the respondents' version, including the Attorney-General's opinion, in so far as it does not recognise persons born from the matrilineal line of the royal family, is in conflict with the Constitution. For that reason, it cannot be regarded, in the light of that inconsistency with the Constitution, to be of force and effect in that particular regard.

[94] This accordingly leads me to the conclusion that the applicant's contention that the decision by the Minister, accepting the customary law version of the respondents, without necessarily deciding on the correctness of the customary law, is in violation of the Constitution in that it discriminates against women. For that reason, the decision of the Minister, approving the third respondent's designation, cannot stand and must perforce, be set aside.

[95] To the extent necessary, I find apposite to make the following observation. The third respondent, as mentioned earlier, when canvassing the respective parties' positions, mentioned that the applicant is disqualified from ascending to the chieftainship because he was born out of wedlock.

[96] It is not necessary, for the present proceedings, to make any firm finding in this regard. It suffices that the following observation is made: in *Frans v Paschke*[12] a Full Bench of this court declared that the differentiation of children on the basis of which they are said to be illegitimate, is discrimination and thus unconstitutional.

Conclusion

[97] In view of the discussion above, together with the conclusions reached, it seems to me that the applicant's application has merit. As such, it is appropriate to grant the relief sought. I should, in this regard, apologise to counsel that I do not find it necessary to decide on all the legal issues raised, particularly on behalf of the applicants. The issues that have been addressed above, appear to be sufficient to make the appropriate ruling, without resorting to 'an over-kill', as it were.

Representation of the Third Respondent

[98] It was submitted on the applicants' behalf that the court had, in the previous urgent proceedings, expressed its concern regarding the fact that the Office of the

[12] *Frans v Paschke* Case No. (P) I 1548/2005) (delivered on 11 July 2007).

Government Attorney represented both the Minister and the third respondent. The court found this to be odious, for the reason that the Government Attorney ordinarily represents Government officials. It appeared improper that the same office should have appeared for a person who is a beneficiary of a decision by a Minister, and at the expense of the public purse.

[99] I am of the considered view that the concern expressed then was justified. The applicants' counsel observed that notwithstanding the court's negative comment on that issue, the same office still appeared on the third respondent's behalf. This, submitted the applicants, requires censure from the court.

[100] Ms. Kahengombe argued that the point made by the court was well taken and that there was a change in the status of the third respondent after the earlier proceedings. In this connection, as it is common cause, the President recognised the designation of the third respondent in terms of s 6 of the Act. As such, the Office of the Government Attorney, was obliged, with that metamorphosis, to represent the third respondent.

[101] I am of the considered view, in light of the change in status of the third respondent from the time of the initial application for recognition of his designation by the President changed the situation that prevailed at the earlier hearing. The Office of the Government Attorney, was, once the recognition and gazetting of the recognition was done, obliged to represent the third respondent. This provides a full answer to the concern raised on the applicants' behalf.

[102] In any event, it is also a fact that Ms. Kahengombe is now in private practice and no longer works for the office of the Government Attorney. It appears that she was instructed by the Office of the Government Attorney to represent the third respondent in this matter.

Costs

[103] The approach, ordinarily applied in respect of costs, is that costs should follow the event. I am of the considered opinion that the ordinary rule should,

accordingly apply. An issue, as far as my memory serves me well, was raised on the applicants' behalf related to the applicants being funded by the Directorate of Legal Aid. It would appear that the applicants were at some point granted legal aid by the Directorate of Legal Aid.

[104] I am of the considered view that the fact that the applicants have been successful in this application does not render the Government respondents free from liability for costs. In this connection, the costs payable to the applicants shall be subject to the provisions of s 17 of Legal Aid Act, No.29 of 1990.

Order

[105] As intimated in the conclusion above, I am of the considered view that the applicants' application should succeed. I accordingly issue the following order, which presents itself as condign in the circumstances:

1. The decision taken by the Minister of Urban and Rural Development ('the Minister), on 23 April 2019, alternatively on 22 May 2019, approving the application for the designation of Mr. Hendrik Ismael Witbooi ('Third Respondent'), and in terms of which the Third Respondent was designated as the Kaptein of the Witbooi (/Khowese) clan is hereby reviewed and set aside.
2. All the processes and/or steps taken following the Minister's decision, and in particular the following steps be and are hereby set aside:
   2.1 the First Respondent's notification of his decision to the President in terms of section 6(1) of the Traditional Authorities Act, 2000;
   2.2 the President's recognition and designation of the Third Respondent as the Kaptein (Chief) of the Witbooi (/Khowese) clan by way of proclamation in the Government Gazette on 15 August 2019.
3. The First, Third, Seventh and Eighth Respondents be and are hereby ordered to pay the costs of this application jointly and severally, the one paying and the other being absolved, consequent upon the employment of one instructed and two instructed legal practitioners.

4. Such costs shall, to the extent applicable, be subject to the provisions of Section 17 of the Legal Aid Act, No. 29 of 1990.
5. The matter is removed from the roll and is regarded as finalised.

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T.S. Masuku

Judge

APPEARANCES:

APPLICANTS:	R. Tötemeyer SC (with him Y. Campbell)
Instructed by:	Dr Weder, Kauta & Hoveka
1ST, 7TH & 8TH RESPONDENTS	R. Ketjijere
	Of the Office of the Government Attorney
3RD RESPONDENT:	S. Kahengombe
	Of Samuel & Co. Legal Practitioners