REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:		**Case No:**
		HC-MD-CIV-ACT-OTH-2017/01833
Blouwes Traditional Authority	1st Plaintiff	**Division of Court:**
Johannes Baarman	2nd Plaintiff	Main Division
		Heard on:
and		22 September 2022
The Minister of Urban and Rural Development	1st Defendant	
Salomon Kooper	2nd Defendant	
Dawid Casius Gertze	3rd Defendant	
Heard before:		**Delivered on:**
Honourable Lady Justice Rakow		14 October 2022
		Delivered on:
		21 October 2022

Neutral citation: *Blouwes Traditional Authority v The Minister of Urban and Rural Development (*HC-MD-CIV-ACT-OTH-2017/01833) [2022] NAHCMD 582 (14 October 2022)

Order:

1. The claim is dismissed with costs
2. Matter is removed from the roll: Case Finalized.

Reasons for order:

RAKOW J

Introduction

[1] The first plaintiff is the Blouwes Traditional Authority, a traditional authority established by the Traditional Authorities Act 25 of 2000. The second plaintiff is Johannes Baarman, the Chairman of the Blouwes Traditional Authority. The first defendant is the Minister of Urban and Rural Development, the second defendant, who replaced Mr. Salomon Kopper, who was the chairperson of the steering committee of the Veldskoendraers Traditional Authority, is Mr. Martin Windstaan and the third defendant is Dawid Casius Gertze.

[2] The origin of this matter dates from 2009 when the then chief of the Blouwes Traditional Authority, Chief Hans J Titus, passed away and had to be succeeded. The Blouwes Traditional Authority consists out of two tribes, one being the Veldskoendraers or //Hawoben and the other being the Keetmanshoopers or !Karo-!Oa. These two groups were recognized as one traditional authority, the Blouwes Traditional Authority by the then Minister of Regional, Local Government and Housing and as such, the recognition was published in Government Gazette no 2020 of 31 December 1998 and Captain Hans J Titus was recognized as Chief with one senior traditional councilor, Moses Jacobs and four traditional councilors, Manuel Kinda, Johannes C Hupita, Sussan K Rhoman and Adam April. However the designation in the Government Gazette, the traditional community is identified as the Veldskoendraers. In a letter from the Deputy Permanent Secretary of the Ministry of Regional, Local Government and Housing dated 12 January 1999 the Traditional Authority is referred to as the Blouwes Traditional Authority of the Veldskoendraers Community.

[3] In 2010, an application was filed with the then Minister of Regional and Local Government, Housing and Rural Development (“the Minister”) to appoint the now deceased second defendant as Chief of the Blouwes Traditional Authority. From a presentation to the Blouwes Traditional Authority dated 14 January 2011 and part of the additional review record page 20, it seems that the person nominated by the //Haboben Community was elected by them on 15 August 2010. The Minister approved the application and indicated the said appointment in a letter dated 22 October 2010.

[4] After some meetings between the minister, the members of the Ministry, and the members of the Blouwes Traditional Authority, where they indicated that they are not satisfied with the appointment made by the minister, starting with a meeting between the Blouwes Traditional authority and the minister on 17 November 2010. And further meeting in January at Keetmanshoop, the Minister wrote a letter to Mr Kopper dated 28 January 2010 informing him that a leadership dispute has arisen amongst the Traditional Community of Blouwes and that they are not to proceed with the inauguration of Mr Gertze as Captain of the Blouwes/Veldskoendraers/Kharo-1Oan Traditional Community until the Blouwes Traditional Community solves the leadership dispute among themselves amicably. From there on a number of letters were written and meetings occurred between the community members, the minister and ministry wherein the issue of the nomination of Mr Gertze was discusses as well as the issues surrounding the leadership dispute. During this time, the acting chief Mr Jacobs also passed away.

[5] In a letter dated 27 November 2012, the then Minister of Regional, Local Government and housing was informed by Mr Johannes Barmaan, the second plaintiff and Chairman of the Blouwes Traditional Authority that it was decided during a meeting that the authority held to recommend Mr Johannes Benjamin Koopman as the successor to the late Chief Hans Titus. The Minister was then also informed that the relevant application forms as required by the Act no 25 of 2000 would be submitted shortly[1]. On 7 January 2013 an application from the second plaintiff, Mr Johannes Koopman was submitted for the chieftaincy of the Blouwes Traditional Authority to the Minister. This is then also the crux of the matter that the plaintiff seeks to be rectified as it is alleged that the Minister failed to consider this application and continued with the view that a leadership dispute exists.

[6] Mr Salmon Kopper was informed in a letter of which the date is not very clear, but which must have been written in the latter part of 2013, that the Minister had appointed an investigating committee to investigate the succession dispute in terms of section 12 of the Traditional Authorities Act, following the numerous complaints received by the Minister in this regard. The //Haboben Traditional Community was invited to a meeting with the committee on 13 November 2013 at Blouwes.

[1] Page 41 of additional review record.

[7] The investigation committee at that stage was tasked to investigate six leadership disputes and as part of their investigation, met with the members of the Blouwes Traditional Authority group as well as the second group supporting Mr Gertze as chief. Both these groups had the opportunity to address the committee on their objections as well as their understanding of the customary law. The so called Blouwes group indicated that they followed the process as per the customary law. They nominated nine candidates who were introduced in a community meeting which was attended by about 130 members of the community. It was then left in the hands of the elders to decide on the final candidate and they then decided on Mr Koopman. The group supporting Mr Gertze said that they followed no customary laws as there was no customary laws for them to follow. They consulted with the families of the previous chiefs and obtained proposals for candidates. They then went over to an election and as such appointed chief Gertze. It was then their proposal to appoint Mr Gertze as the chief of the community.

[8] The investigation committee prepared a report to the Minister in which it was recommended that an election takes place as provided for in section 5(10) of the Traditional Authorities Act, Act no 25 of 2000 and that it should be between the two prominent candidates where the winning party takes the leadership. They further recommended that the non-victorious party should be appointed in the Senior Councilor position. This report is dated 11 November 2013 to 22 February 2014. On 5 June 2015 the then minister wrote to the Chairman of the Blouwes Traditional Authority that the investigation report reveals that there is uncertainty pertaining to the applicable customary law to designate a chief in the Blouwes Traditional Community in respect of the two clans. She further indicated that it is therefore difficult to safely conclude as to whom between the two candidates the rightful successor of the deceased chief Hans Titus is. She then proposed that the only solution to the dispute is to hold an election between the two aspiring candidates being Messrs Gertze and Johannes Benjamin Koopman.

[9] The minister reminded the community in June 2016 that an election date is set for the election of a new chief, being 19 July 2016 and nominated various officials from the Electoral Commission and the Ministry to assist with the said elections. It however transpired that both groups were not ready to proceed with an election on the said date and no election took place as the parties were not happy with the decision the minister took. It was after this that the current matter was instituted.

Relief

[10] Initially the plaintiff sought the following relief:

The Plaintiff prays for an order against the first defendant for:

1. A *Mandamus* compelling him to:
   1.1 Withdraw, alternatively set-aside the declaration of a Chieftainship Dispute; and
   1.2 Exercise his statutory duty to formally consider the application to designate Mr Johannes Benjamin Koopman as Chief of Blouwes Traditional Authority.

[11] The particulars of claim was amended and what remained was the request for an order against the Minister to exercise his statutory duty to formally consider the application to designate Johannes Benjamin Koopman as Chief of the Blouwes Traditional Authority,

The points in terms of rule …. Identified by the court for answering

[12] In the initial application before myself I found the following:[2]

‘ Although not formally asked by any of the parties, I came to a decision to deal with some of the questions of law before embarking on the determination of the issues of fact as I am of the opinion that if successfully determined, these issues can bring an end to this matter. Although I dealt with some of the legal definitions of the issues identified, I have not made any finding with regard to what the answer should be on the two legal questions as formulated by the parties here-under. We will therefore deal with them first and as they are not issues of fact but issues of law, we can proceed and deal with them during arguments.

[25] These are:

1. Whether the first defendant exercised his discretion as an administrative functionary when the application was considered.
2. Whether the decision was administrative in nature as it was the exercise of public power and in accordance with the Act.

After deciding the above, the court will decide also whether the relief asked by the plaintiffs is relief that can be granted eventually by the court. The result of the determination of the above issues will then be

either to find that the matter is not a review matter, and subsequently deal with it as such or to find that it

[2] *Blouwes Traditional Authority v The Minister of Urban and Rural Development* (HC-MD-CIV-ACT-OTH-2017/01833) [2022] NAHCMD 374 (19 July 2022).

is indeed a matter for review and then deal with the consequences of such a finding.'

Arguments

[13] For the plaintiff it was argued that the Blouwes Traditional Community is a 'traditional community' as defined in terms of section 1 of the Traditional Authorities Act, 25 of 2000. After the passing of the then chief Hans Titus in 2009, the community has been without a chief since 2009, so for the past 13 years. This *lacuna* was created in part by the dispute between the two tribes comprising the Blouwes Traditional Authority as to who the next chief should be. The position was further in part also caused by the Minister's *ultra vires* actions and failure to take a decision with regard to the application by the Blouwes Traditional Authority to appoint Mr Baarman as chief.

[14] The Minister has taken the position that she is *functus officio* since a decision was made and therefore cannot take any further action to resolve the dispute as the election solution she prescribed failed and as such the decision ran its course. It was further argued that the process of consultation was followed when the nomination of Mr Baarman was made as chief and therefore a resolution was taken by Blouwes Traditional Authority, which decision still stands and must be given effect to. It is therefore not as simple as to make a new nomination to the Minister. Therefore if the court does not interfere, the community will remain without a chief till kingdom come. The counsel for the plaintiff further agreed that the Minister's decision was an administrative decision. It was further argued that the Minister's decision was *ultra vires.*

[15] For the first defendant it was argued that what the plaintiff seeks when it seeks a mandamus, is a common law remedy of review and the plaintiff did not bring a review application before this Court. It was further submitted that the decision of 05 June 2015 was administrative in nature as it was the exercise of public power by the first defendant and the first defendant decided that an election be held in terms of section 5 (10) of the Traditional Authorities Act, 2000 (Act No. 25 of 2000). The first defendant is appointed by the President as the Minister derives his/her powers from the Traditional Authorities Act, 2000 (Act No. 25 of 2000) and is therefore an administrative functionary official within the meaning of Article 18 of the Namibian Constitution together with the common law principles of natural justice and therefore there can be no doubt that the Minister, as an administrative functionary or official, exercised a discretion.

[16] On behalf of the second and third defendants it was argued that the first defendant's power to consider an application for chieftainship of a traditional authority is derived from section 5 of the Act, and serves to benefit the public in general, and more specifically the traditional community in issue. It follows that the act of consideration of the second application by the first defendant is undoubtedly administrative in nature.

Legal considerations

[17] The following requirements for a decision to be an administrative decision were set by Nugent, JA in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[3]

'[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of "an administrative nature") that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of state. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.

[25] The law reports are replete with examples of conduct of that kind. But the exercise of public power generally occurs as a continuum with no bright line marking the transition from one form to another and it is in that transitional area in particular that "[d]ifficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33".[4]

In making that determination.

"[a] series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional

[3] *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* (347/2004) [2005] ZASCA 43; [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA) (13 May 2005).

[4] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC).

review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33."[5]
It has also been emphasised that the difficult boundaries will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'[6]

[18] Parker, in *Administrative Law: Cases and Materials*,[7] goes further, and describes "administrative action" as action being taken by administrative bodies, including parastatals or state-owned enterprises, and notes that such bodies are liable to judicial review in terms of Article 18 of the Namibian Constitution; however, this is only to the extent where the parastatal or state-owned enterprises derive their authority from an act or legislature.

[19] In deciding whether the Minister's decision in the current case was administrative in nature, the answer must be found in *Kapika v Minister of Urban and Rural Development*[8], where the Court noted:

'The Minister derives her power to designate a person as chief from the Act. It is trite law that the Minister is an administrative official and as such, is subject to the provisions of Art 18 of the Namibian Constitution.'

[20] What ultimately needs to be decided regarding the decision taken and the standing of such a decision will direct the outcome of the current matter. The legal principles set out in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[9] and applicable in deciding whether the Minister's decision can just be disregarded is as follows:

'[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was

[5] *SA Rugby Football Union Supra.*
[6] *SA Rugby Football Union Supra.*
[7] Parker C, 2019. "Administrative Law: Cases and Materials", Windhoek, UNAM Press.
[8] *Kapika v Minister of Urban and Rural Development,* [2018] NAHCMD 51.
[9] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (*41/2003) (2004) ZASCA 48; (2004) 3 All SA 1.
(SCA) (28 May 2004).

the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter: Administrative Law 355:
"There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled."'

[21] In *Harnaker v Minister of the Interior*[10] Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) 'in a sense delay would . . . "validate" the nullity'. Or as Lord Radcliffe said in *Smith v East Elloe Rural District Council*[11] said:

'An [administrative] order is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

[21] In the matter of *Witbooi v Minister of Urban and Rural Development*[12], Masuku J said the following regarding the Minister being *functus officio*:

'[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

[10] *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C).
[11] *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) 769- 770.
[12] *Witbooi v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00225) [2022] NAHCMD 172 (05 April 2022.

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*[13] the Supreme Court expressed itself on the doctrine of *functus officio*. It again had a later opportunity to do so in *Hashagen*[14], 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."

[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.'

Conclusion

[22] The questions identified by the court previously. These were:

[13] *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) 834 (SC).
[14] *Hashagen v Public Accountants and Auditors Board* SA 57/2019 (delivered on 5 August 2021).

1. Whether the first defendant exercised his discretion as an administrative functionary when the application was considered.
2. Whether the decision was administrative in nature as it was the exercise of public power and in accordance with the act.

[23] On the first question the court finds that he has indeed exercised his discretion as an administrative functionary when the application was considered. On the second question as to whether the decision was administrative in nature as it was the exercise of public power and in accordance with the act, the court also came to a conclusion that it is indeed the case.

[24] After answering the above questions the court must deal with the question of whether the relief asked by the plaintiffs is relief that can be granted eventually by the court. The result of the determination of the above issues is that the court finds that the matter is indeed one that merit a review and that the relief sought by the plaintiff in this matter is unattainable whilst the two decisions, one being the appointment of Mr Gertze as traditional chief, and secondly, the finding by the Minister that a leadership dispute indeed exist and that the resolution to the dispute would be to hold an election to determine the next traditional chief, still stands. In light of this, it would be impossible to grant a *mandamus* against the minister with the instruction that he needs to make a decision on the application of Mr Baarman to designate Mr Koopman as traditional chief.

[25] In light of the above I find the following:

1. The claim of the plaintiff is dismissed with costs.
2. Matter is removed from the roll: Case Finalized.

Judge's signature	**Note to the parties:**
E RAKOW Judge	Not applicable
Counsel:	
Plaintiff:	**First Defendant**:
R Lewis	N Mutorwa

Instructed by Delport Legal Practitioners, Windhoek	Instructed by Office of the Government Attorney, Windhoek
	Second and Third Defendant:
	E Angula Of AngulaCo Inc, Windhoek