

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case No: HC-MD-CIV-MOT-REV-2019/00239

In the matter between:

**OVAMBANDERU TRADITIONAL AUTHORITY**

**APPLICANT**

and

<b>MINISTER OF URBAN AND RURAL DEVELOPMENT</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>THE PRESIDENT OF THE REPUBLIC OF NAMIBIA</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>TIRIMURO HOVEKA</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>COUNCIL OF TRADITIONAL LEADERS</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>GOVERNOR OF OMAHEKE REGION</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>HOVEKA TRADITIONAL AUTHORITY</b>	<b>6<sup>TH</sup> RESPONDENT</b>

**Neutral Citation:** *Ovambanderu Traditional Authority v Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2019/00239) [2023] NAHCMD 525 (25 August 2023)

**CORAM:** MASUKU J

**Heard:** 13 March 2023

**Delivered:** 25 August 2023

**Flynote:** Applications and motions – Rule 76 – Administrative Law – Review of decision to designate a Chief of Traditional Authority in terms of the Traditional Authorities Act 25 of 2000 ('the Act') – Audi alteram partem rule – Points of law *in limine* – to be raised in affidavits and not in case management reports – non-joinder – Applicants' *locus standi* in terms of s 12 of the Act.

**Summary:** The applicant filed an application to review and set aside the decision made by the Minister of Urban and Rural Development approving the designation of the third respondent, Mr Hoveka, as Chief of the Hoveka Traditional Authority ('HTA'). The Minister in or about October/November 2018, approved the designation of Mr Hoveka as the chief of the HTA in terms of s 3(4)(a) of the Act. Thereafter, the President made a proclamation in the Government Gazette, recognising the designation of Mr Hoveka, as chief of the HTA, in respect of the Otjimana Traditional Community ('OTA'). The respondents took a contrary position that the decisions taken are lawful. Several points of law *in limine* were raised by the respondents, which were dismissed. On the merits, the OTA, through the Minister's predecessors, had filed previous applications for recognition, which had all failed. Some of the reasons for refusal were that the OTA was part of the applicant and it was also clear that the applicant, was made up of members of the OvaMbanderu traditional community. The Minister failed to consider the reasoning behind the aforementioned failed applications and further refused the applicants an opportunity to make representations before taking his decision.

*Held:* That the applicants have the necessary *locus standi in judicio* to institute the proceedings in question, as s 12 of the Act relates to a dispute regarding the designation of a person as a chief or successor to a chief. However, it does not constitute the only type of dispute that may arise in relation to traditional communities.

*Held that:* Points of law *in limine* should appear in the affidavits filed by the respondents. It is incorrect and unfair to the applicant and the court for the

respondents to raise points of law for the first time in the case management report.

*Held further that:* Rule 76 makes it abundantly clear, that where a party seeks to review a decision or proceedings of an administrative official, which is what the applicant is seeking to do, then the challenge of that decision or proceedings, must ordinarily be made by way of application.

*Held:* The Minister should, knowing the applicant's well-documented interest in the application, have afforded the applicant a hearing before he made the decision to approve the designation of Mr Hoveka as the chief of the HTA.

*Held that:* It is improper for a Minister to render advice to the HTA in respect of an application pending before him. A clear line must be drawn between advisors and decision-makers. Once these lines are blurred, the decision may have to be set aside. Decision-makers must always wear neutral adjudicatory apparel.

*Held further that:* The subsequent decisions sought to be impugned, including that of the President, has as its foundation and being, in the recognition of the HTA as a separate traditional community and the designation and recognition of Mr Hoveka as a chief. If the decisions of the Minister are set aside, the other subsequent decisions cannot exist independently of the Minister's impugned decisions.

*Held:* The decisions by the Minister are invalid as they violate the applicable law and cannot be allowed to survive the court's curial scrutiny.

*Held that:* The proclamation of the recognition of Mr Hoveka in the Government Gazette is not an executive act by the President. It is done in terms of the provisions of the Act and not the Constitution.

The applicant's application therefor upheld with costs.

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## ORDER

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1. The application for review of the decision made by the Minister in October/November 2018, approving the designation of the third respondent as Chief of the Hoveka Royal House is hereby reviewed and set aside.
2. The designation of the third respondent as chief of the Hoveka Traditional Authority on 23 November 2018, pursuant to the Minister's aforesaid approval referred to in paragraph 1 above, is declared null and void as contemplated in section 3(4) of the Traditional Authorities Act 25 of 2000.
3. To the extent necessary, the decision of the second respondent, taken on or about 19 July 2019 and published in Government Gazette No. 6965 as Proclamation 29, recognising the third respondent as the Chief of the Hoveka Traditional Authority, residing in Eiseb Block, is hereby reviewed and set aside.
4. The respondents are ordered to pay the costs of the application jointly and severally, the one paying and the other being absolved, with the said costs being consequent upon the employment of one instructing and one instructed legal practitioner.
5. The matter is removed from the roll and is regarded as finalised.

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## JUDGMENT

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### MASUKU J:

#### Introduction

[1] Decisions are the life-blood of a functioning public administration system. For any administration to be effective, it is required to make decisions. At times, those decisions may be regarded as wrong and thus unpopular or

unpalatable to one or other segment of the community. This becomes more pronounced in relation to those persons intimately affected by the decision sought to be impugned. Possible disaffection with decisions that have to be made, does not constitute a sound reason for the decision-maker to become shy or frigid from making decisions. To do so, would amount to the decision-maker succumbing to the ills and the perils of indecision.

[2] Happily, our Constitution and the common law, have made avenues open to those who are the recipients of decisions they consider to be wrong, illegal, unreasonable and thus be unpalatable. This court has thus been granted powers of review, and where applicable, appeal, to correct what may be considered to be egregious decisions that should not be allowed to stand because they are inconsistent with the Constitution, statute or the common law.

[3] Serving before court is an application for the review of a decision. In the main, the applicant claims that a decision made by the Minister of Urban and Rural Development in or about October 2018, approving the designation of the third respondent, Mr Turimuro Hoveka, as Chief of the Hoveka Royal House, is susceptible to be reviewed and set aside by this court. It seeks other consequential relief that shall be adverted to in due course.

[4] The remit of the court in the present matter, is to decide whether the application for review prayed for by the applicant, should be granted. This is so because the respondents have not taken the application supinely. They have rendered stiff opposition, claiming that the destiny of the application is a one-way street – along the paths of dismissal. Which position adopted by the protagonists, the court will endorse, will be apparent at the end of this judgment.

#### The parties

[5] The applicant is the Ovambanderu Traditional Authority. It is designated and recognised as such in terms of s 5 and 6 of the Traditional

Authorities Act, 25 of 2000, (the 'Act'). The first respondent is the Minister of Urban and Rural Development. He is appointed as such in terms of the Constitution. The second respondent is the President of the Republic of Namibia. He is appointed in terms of the relevant provisions of the Constitution.

[6] The third respondent is Mr Turimuro Hoveka, an adult Namibian male, whose designation as Chief was approved by the Minister. It is that approval of the designation, that the applicant intends to have set aside in these proceedings. The fourth respondent is the Council of Traditional Leaders, an entity established in terms of the Act. It is cited for any interest it may have in the relief sought. The fifth respondent is the Hoveka Traditional Authority, an entity recognised in terms of the Act and which the applicant contends was recognised in violation of the Act.

[7] For purposes of this judgment, the OvaMbanderu Traditional Authority ('OTA') will be referred to as 'the applicant' or 'the OTA'. The first respondent, the Minister of Urban and Rural Development, will be referred to as 'the Minister'. The second respondent, the President of the Republic, will be referred to as 'the President'. The third respondent, Mr Turimuro Hoveka, will be referred to as 'Mr Hoveka'. The fourth respondent, the Council of Traditional Leaders, will be referred to as 'the Council'.

[8] The Governor of the Omaheke Region, cited as the fifth respondent, will be referred to as 'the Governor', whereas the sixth respondent, the Hoveka Traditional Authority will be referred to as 'the HTA'. Where reference is made to above parties collectively, they will be referred to as 'the parties'.

### Representation

[9] The applicant, in these proceedings, was ably represented by Ms Bassingthwaighe, whereas Mr Khama valiantly represented the Government respondents, being the Minister, the President, the Governor and the Council. Mr Kanguuehi, on the other hand, duly represented Mr Hoveka and the HTA.

The court records its indebtedness to all counsel for the assistance they dutifully rendered to the court. That one or other party may not succeed in this application should not be regarded as a reflection of the level of application of the losing party's counsel.

### The relief sought

[10] As can be gleaned from the amended notice of motion, the applicant seeks the following relief:

'1. Calling upon the respondents to show cause on a date to be determined by the managing judge why:

- 1.1 The decision of the first respondent taken during or about October/November 2018 (the exact date being unknown to the applicant) approving the intended/proposed designation of the third respondent as Chief of the Hoveka Traditional Authority should not be reviewed and set aside;
- 1.2 The designation of the third respondent as chief of the Hoveka Traditional Authority on 23 November 2018, pursuant to the first respondent's aforesaid approval, should not be declared null and void as contemplated in section 3(4)(a) of the Traditional Authorities Act 25 of 2000 ('the Act');
- 1.3 The decision of the second respondent taken on or about 19 July 2019 and published in Government Gazette No 6965 on 1 August 2019 as Proclamation 29, recognising the third respondent as the Chief of the Hoveka Traditional Authority, in respect of the Otjimana Traditional Community, residing in the Eiseb Block, should not be reviewed and set aside alternatively declared null and void as contemplated in section 3(4)(a) of the Act;
- 1.4 The establishment of the 6<sup>th</sup> respondent as a traditional authority, through the designation and recognition of the third respondent as chief and the appointment of the senior traditional councillors and traditional councillors, should not be declared null and void as contemplated in section 3(4) of the Act;
- 1.5 The first respondent's decision to announce the designation of the persons identified in Government Notice 21 of 2020 Government Gazette 7115, as senior traditional councillors and traditional councillors of the Hoveka Traditional Authority should not be reviewed and set aside, alternatively declared null and void as contemplated in section 3(4) of the Act;

- 1.6 In so far as it may be necessary, Government Gazette No 6965 on 1 August 2019 as Proclamation 29 and Government Notice 21 of 2020 in Government Gazette 7115 should not be declared null and void and set aside.
- 2 An order directing that the costs of this application shall be paid by those who oppose the application, such costs to include the costs of one instructing and one instructed counsel.'

### Background

[11] The facts giving rise to the present application do not appear to cause much controversy. They are largely common cause. What may be in contention is the legal effect of the actions complained of. Summarised to the irreducible minimum, the events leading to the instant case are briefly narrated below.

[12] The long and short of the dispute is that the Minister in or about October/November 2018 approved the intended or proposed designation of Mr Hoveka as the chief of the HTA. Furthermore and pursuant to the approval of designation, the Minister, in terms of s 6 of the Act, notified the President in writing of the designation of Mr Hoveka as the chief of the HTA, in terms of s 6 of the Act.

[13] Thereafter, the President, pursuant to the designation of Mr Hoveka, on or about 19 July 2019, made a decision to proclaim by Government Gazette 7115 No. 6965 of 1 August 2019, recognising Mr Hoveka as chief of the HTA, in respect of the Otjimana Traditional Community, residing in Eiseb Block. As a result of the recognition and designation of Mr Hoveka as chief aforesaid, the HTA was established as a traditional community, culminating in the appointment of senior councillors and traditional councillors in terms of s 3 of the Act in Government Notice No. 21 of 2020, published in Government Gazette 7115.

[14] It is the applicant's case that all these decisions mentioned above, are liable to be reviewed and set aside or they are null and void for reasons that



will become apparent when they are dealt with individually. It is so that the respondents in this matter, take a contrary position, namely, that the decisions taken are lawful and in keeping with the dictates of the applicable law. The respondents therefor moved the court to dismiss the application with costs, as, according to the respondents, the applicant is not entitled to the relief sought as fully captured above.

#### The applicant's case

[15] The applicant's founding affidavit is deposed to by Mr Kilus Munjuku III Nguvauva. He describes himself as the chief of the OvaMbanderu Traditional Authority, duly designated and recognised in terms of the Act. He was furthermore proclaimed and gazetted as such via a Proclamation of 27 February 2015. It is his case that in 2018, he got to know from radio announcements that the Minister had approved the designation of Mr Hoveka as chief of the Hoveka Royal House.

[16] The applicant, through its legal representatives, wrote a letter protesting the approval of the said designation by the Minister.<sup>1</sup> The applicant threatened to approach the courts for appropriate relief should their demands not be met. The applicant pointed out therein that previous attempts by the HTA to be recognised as a Traditional Community had been unsuccessful in a court application. The applicant further wrote a missive to the President, dated 16 November 2018.<sup>2</sup>

[17] In its letter, the applicant informed the President that it had come to its attention that the Minister had approved an application for the designation of Mr Hoveka on the week of 23 November 2018. This was despite the fact that Mr Hoveka had deliberately misrepresented his qualification to the office of the Minister. It was the applicant's contention that Mr Hoveka did not qualify to have been so designated and reasons for those representations were given in

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<sup>1</sup> Letter dated 7 November 2018, directed to Minister Peya Mushelenga, p 91 of the record of proceedings.

<sup>2</sup> Letter dated 16 November 2018, p 96 of the record of proceedings.

the letter. Accordingly, the applicant requested the President to put on hold the recognition of Mr Hoveka whilst the applicant approached this court for appropriate relief.

[18] The applicant contends that had the Governor properly verified information relevant to the designation of Mr Hoveka as chief, he would have discovered that the area in respect of which the designation was approved by the Minister, was in Eiseb Block, an area that the applicant had mentioned in its application in October 2014.<sup>3</sup> Furthermore, the applicant claims that there are very few of the Hoveka clan who live in Eiseb.

[19] It is the applicant's case that the Hoveka clan is one of the clans that make up the OvaMbanderu and that the area to be occupied, namely, in the Otjimana Community, is under the applicant's jurisdiction. The applicant further states that there is no Otjimana Traditional Community and that those people who reside in Eiseb Block fall under the applicant's jurisdiction. As such, the HTA is attempting to establish a traditional community in an area where a recognised traditional community is already extant.

[20] The applicant further contends that were the Minister's decisions to be upheld, it would result in a split of an existing traditional community and further encourage the mushrooming of traditional authorities in contravention of government policy. By no means least, this will result in the undermining of the applicant's authority and cause breakaway among the OvaMbanderu clans.

[21] It is further the applicant's case that the recognition of two chiefs is anathema among the OvaMbanderu people and is therefore untenable. It will result in confusion and unrest among the people in the community. It is the applicant's further case that even in the history books, the HTA or the Hoveka clan, do not find mention as a separate grouping such as the Kambazembi, the Ovaherero, the Zeraua and the OvaMbanderu. The applicant goes into

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<sup>3</sup> Page 111-112 of the record of proceedings. Areas of communal land mentioned are Epukiro, Eiseb, Otjombinde, Aminius, Otjonene, Opuro and Gam.

some detail regarding the previous applications made by the HTA and these will be dealt with later in the judgment.

[22] All in all, the applicant contends that in view of the factors mentioned above, it is improper for the Minister to have given the approval that he did. In view of a possible point being taken regarding delay in the launching of this application, the applicant states that it did not rush to approach the court as a review was regarded at the early stages, as premature. This is because Mr Hoveka had not at the early stages, been designated. As such, the applicant drew communication lines with the Minister and the President, resulting in correspondence between these offices and the applicant's legal advisor. It was only around April 2019 that the matter became ripe for review, so the applicant contends.

#### The government respondents' case

[23] The Minister, in his affidavit, raised points of law *in limine*. These included the non-joinder of the HTA, an issue that was later taken care of by the joinder of the HTA as a party to the proceedings. He also contended that the relief sought by the applicant is incompetent or academic. This was because the designation was not made by him but by members of the traditional community concerned. All he did, was to approve the proposed designation as the traditional community would perform the designation thereafter.

[24] The Minister further took the point that the decision by the President, to make Proclamation No. 29 of 2019, was an executive decision, made in terms of Art 32(5)(a) of the Constitution and was thus not reviewable, even by this court. This was especially so having regard to the reasons for review set out by the applicant.

[25] Regarding the designation of Mr Hoveka, the Minister points out that he noted by considering the application form that a traditional authority had been established by the community and that Mr Hoveka had been identified as the

person to be designated. In short, he found that all the necessary parts of the prescribed form had been completed. He further noted certain portions that needed clarity, which he sought and obtained from the Governor.

[26] It is the Minister's case that he thereafter satisfied himself that it was proper to approve their application to designate Mr Hoveka. He accordingly approved the designation and sent Mr Philip Tjerije to represent him at the designation ceremony. After that, he notified the President that he was satisfied that Mr Hoveka had been designated in terms of the Act, whereafter, the President recognised the designation and accordingly promulgated proclamation No. 20 of 2019.

[27] On the merits, the Minister denies that he approved the designation of Mr Hoveka. He points out that he approved the application to designate Mr Hoveka. It is his case that it is the community that should designate a candidate for the office and not the Minister. He maintains that the Governor made all the necessary verifications in relation to the designation of Mr Hoveka. The Minister also takes issue with the fact that the applicant did not challenge the verification process made by the Governor.

[28] The Minister proceeds to deny that meeting a delegation from the HTA was in any manner, shape or form inappropriate as suggested by the applicant. He states that as Minister, when requested to have an audience with Namibians who require to consult with his office, he has to oblige. It is his version that the delegation came to see him about recognition issues and he explained to them the processes involved, including the various requirements of the Act, in particular. All in all, the Minister takes the view that the application ought to be dismissed with costs as it is entirely without merit.

#### The third and sixth respondents' case

[29] I will not delve into the intricate details of the allegations contained in Mr Hoveka's papers. He accepts that the Hoveka Royal House belongs to the OvaMbanderu. He asserts, however, that the OvaMabanderu clans have not

always resorted under a centralised leadership. He deposed that Otjimana is a district community from the community led by the applicant, but has existed in history, parallel to the applicant.

[30] Mr Hoveka goes into some details of the history of his people, which is not necessary to narrate in this application. He however, vehemently denies that there is any confusion resulting from his designation and alleges that the applicant is trying to distort the history. It is his case that the Minister consulted extensively and that the decision that the Minister made was correct. In this wise, he contends that he consulted five neighbouring traditional communities on his application for designation, the applicant included. There was, in the circumstances, no reason to successfully challenge the Minister's decision, he retorted.

Points of law *in limine*

[31] It is plain that there are a number of matters that are raised by the respondents *in limine*, that it would be convenient to dispose of first. That may have the advantage that if such points are upheld and they are dispositive of the entire application in the court's view, that would render it unnecessary for the court to deal with those other issues, possibly on the merits.

[32] It is plain, from the heads of argument, that the applicant is, to put it mildly, irked by some of the points *in limine*, taken, especially by the government respondents. The applicant views some of these points of law as spurious and overly and unduly technical. The court will not express its view on these sentiments at this juncture. In this regard, I agree with counsel for the applicant, that issues in dispute between or among the parties, should be raised in the papers thus affording the party affected thereby, to deal with them.

[33] In the instant matter, it appears that some of these points of law were raised as an afterthought and after pleadings, so to speak, had been closed. I say so because they do not appear in the affidavits filed by the respondents.

As such, the applicant was denied the procedural right to deal with them in reply. They just happen to mushroom, as it were, in the case management report. They do not germinate from the pleadings but appear to rather fall from the proverbial sky, as it were. That is not a location where they belong.

[34] The unfairness of raising these issues in the case management report, is manifest. Case management reports are generally not designed to create an avenue for raising new issues in dispute outside the binding circumference of the pleadings. Case management reports, are designed to distil the issues pleaded by the parties and which are in contention between or among the litigants and therefor require the court to exercise its interpretational and adjudicative machinery to resolve them.

[35] The applicant's point is, in my view, well taken and should carry the day. For that reason, the issues of alleged delay in launching this application, the non-joinder of the traditional councillors and senior traditional councillors, were not properly raised, thus not affording the applicant an opportunity to deal with them in the papers. In any event, the councillors, both traditional and senior traditional, as correctly submitted for the applicant, though they have not been individually cited, are part and parcel of the sixth respondent and need not have been individually cited or joined to the proceedings.

[36] It is perhaps important to mention that the issue of non-joinder of the OTA, which was raised by the respondents, is no longer a live issue since the applicant joined the OTA and it has remained a party in these proceedings, rendering that point unnecessary to deal with at this juncture. I have dealt with this issue earlier in the judgment.

[37] The remaining points of law include the following – lack of standing of the applicant; the court's jurisdiction and alleged disputes of fact, which render this matter unsuitable to deal with on motion proceedings. I deal first with the issue of the applicant's alleged lack of *locus standi in judicio* (legal standing to bring these proceedings).

*The applicant's locus standi*

[38] The respondents, especially the third and sixth, allege that the applicant does not have standing in law to institute these proceedings. It is recorded in this regard that there is no provision in the Act that confers power on the applicant to launch these proceedings and seek the relief set out above. The respondents contend that the only power provided for in the Act, which would confer *locus* on a party, is to be found in s 12 of the Act. It is pointed out that the said provision, in any event, relates to disputes between or amongst members of traditional communities and not among traditional authorities, established in terms of s 2 of the Act.

[39] Broken down to its irreducible minimum, the respondents claim that when the scheme of the Act is taken into consideration, the legislature, in enacting the Act, had in mind disputes that needed resolution among members of a traditional community *inter se* in relation to whether a particular person should be designated as a chief or not. It did not envisage the existence of disputes between or among traditional authorities established in terms of s 2 of the Act. The applicant pours scorn on this argument.

[40] Section 12 of the Act, entitled 'Settlement of disputes', reads as follows:

'(1) If a dispute arises amongst the members of a traditional community as to whether or not a person to be designated as –

- (a) chief or head of the traditional community in terms of section 4 is the rightful or a fit and proper person under the customary law of that community to be so designated; or
- (b) successor in terms of section 8 is the rightful or a fit and proper successor to the office of chief or head of the traditional community under the customary law of the community,

and members of that traditional 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, stating the nature of the dispute.

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

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

(4) In the investigation or resolution of a dispute under this section regard shall be had to the relevant customary law and traditional practices of the traditional community within which the dispute has arisen.'

[41] Do these provisions, properly construed, prevent the applicants from approaching this court for the relief they seek? I think not. The above provision relates to a dispute regarding the designation of a person as a chief, successor to a chief or head of a traditional community. It does not, in my view, constitute the only type of dispute that may arise in relation to traditional communities.

[42] In the instant case, I am of the considered view, that the provisions of s 3 of the Act, are instructive. They deal with the powers, duties and functions of traditional communities. Significantly, subsection (4) thereof, provides the following:

'Where a traditional authority referred to in section 2(1) has been established for a traditional community, and a group of members of that traditional community establishes in conflict with the provisions of this Act another authority purporting to be a traditional authority for such group, and any member of such last-mentioned authority exercises or performs any of the functions contemplated in paragraphs (b) and (h) of subsection (1) and paragraph (a) and (b) of subsection (3) of this section –

(a) any such act shall be null and void; and

(b) such member shall be guilty of an offence, and upon conviction be liable to a fine of N\$4 000 or to imprisonment for a period imprisonment for a period of twelve months or to both such fine and imprisonment.'



[43] It will be recalled that the applicant's complaint in this matter, is that the HTA established itself as a rival, so to speak of the applicant. It claims that the members of the HTA belong to it and as such, the HTA has violated the provisions of s 3(4), quoted above. In the premises, it would be absurd to claim, as the respondents do, that where a party, in the applicant's shoes, inclines to the view, whether rightly, or wrongly, that a rival traditional authority is being set up, in violation of the above quoted provision, it would have no *locus standi*, for a declarator in that vein, together with other relief, it may consider appropriate.

[44] I am of the view that the respondents' contentions in this regard, are ill conceived. Section 12, on which they rely, does not proclaim itself as the only provision that deals with possible disputes among traditional communities. The instant case shows perfectly, that the applicant is raising a dispute through which it seeks to vindicate its authority over the OvaMbanderu people and the legislative solicitudes, expressed in s 3(4) above. I cannot, in good conscience, uphold this point *in limine*.

[45] The timeless remarks that fell from the lips of O'Regan AJA in *Trustco Limited t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others*,<sup>4</sup> should not be allowed to sink into the rubble of oblivion. The learned Judge stated the following:

' . . . in a Constitutional State citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty to the law, to determine their rights.'

[46] The reason for affected parties to approach the court without unnecessary let or hindrance is not just a fictional façade. It is designed to ensure that parties who have disputes, approach the courts to resolve their disputes according to law. The alternative, where parties are, because of the unreasonable approach to standing, denied access to the courts, to seek

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<sup>4</sup> *Trustco Limited t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC).

clarity as to their rights and/or obligations, may result in the state of nature – where the survival of the fittest obtains and parties take the law into their own hands. That would be the very antithesis of the principle of the rule of law, which is foundational in Namibia's constitutional dispensation.

[47] I am of the considered view that this point of law is devoid of merit and must be dismissed as I hereby do. I am of the opinion that the reasoning above, applies with equal force to the argument to the effect that this court does not have the jurisdiction to deal with the instant dispute. That argument is also dismissed as one without merit.

#### Alleged disputes of fact

[48] The issue taken by the government respondents is that there are some disputes of fact in the instant matter. That being the case, so the argument runs, the applicant should be non-suited because the disputes in the instant case are not capable of being resolved in the present type of proceedings.

[49] Ms Bassingthwaighe, for the applicant contends that there are no genuine and material disputes of fact that afflict this matter. It is her contention that in this case, there are legal questions that require an answer and the conclusions on those legal disputes may be the subject of contention between or among the parties. That divergence in the conclusions on the disputed legal issues does not *per se* and without more serve to elevate the difference on the legal conclusions to disputes of fact. I agree.

[50] Even if the contention by Ms Bassingthwaighe, which I have considered to be correct, was on reconsideration, and with the benefit of hindsight, be said to be incorrect, it is necessary to refer to the relevant provisions of rule 76(1). The said provision reads as follows:

'76(1) All proceedings to bring under review the decision or proceedings of an inferior court, a tribunal, an administrative official are, unless a law otherwise provides, by way of application directed and delivered by the party seeking to review

such decision or proceedings to the magistrate or presiding officer of the court, the chairperson of the tribunal, the chairperson of the administrative body or administrative official and to all other parties affected.'

[51] In my considered opinion, the rule maker makes it abundantly clear, that where a party seeks to review a decision or proceedings, in the instant case, of an administrative official, which is what the Minister is, then the challenge of that decision or proceedings, must be made by way of application. I must note that it would seem that the main and critical decision that sets the review ball rolling, is that of the Minister and which is challenged in prayer 1.1 and 1.2 of the amended notice of motion. This is an issue that I will advert to in greater detail later.

[52] In support of the manner in which applications for review must be brought, it would be useful to quote from the celebrated judgment of *South African Poultry Association and Others v Minister of Trade and Industry and Others*,<sup>5</sup> (SAPA), where the court expressed itself as follows:

'[36] At the outset I wish to deal with two important submissions made by the NPI. The first proposition by the NPI is to the effect that SAPA improperly chose to proceed by way of review under rule 76 when it should have proceeded by way of action. I am unable to accept that proposition. Applications to review decisions of administrative officials are brought in terms of rule 76. That has been the premise under the old rules and continues to be the case. That is regardless of whether or not disputes are anticipated or may arise on the facts. The court has always retained an inherent power to have any unresolved dispute resolved by way of oral evidence if the circumstances of the facts justify that course of action.'<sup>6</sup>

[53] It is thus clear that application proceedings are the approved or designated route by which a review of decisions or proceedings by inferior courts, tribunals and administrative bodies or officials can be challenged. This,

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<sup>5</sup> *South African Poultry Association and Others v Minister of Trade and Industry and Others* 2015 (1) NR 260 (HC) para 36.

<sup>6</sup> The above judgment was taken on appeal in *South African Poultry Association and Others v Minister of Trade and Industry and Others* SA 37/2016 [2018] NASC (17 January 2018). The finding of the High Court referred to above, was not overturned on appeal.

it would appear, is regardless of the fact whether a dispute of fact is apparent or is likely to arise as the proceedings unfold. If the dispute does arise, as stated above, the court has the necessary tools in its arsenal, to deal with the dispute. This, in my view, provides a full answer to the respondents' complaint on the employment of rule 76 in the current case.

[54] I am aware of cases where an applicant has approached the court, because of the apparent irresolvable disputes of fact, to seek leave to institute review proceedings by way of action. That is a departure from the norm but it is not unlawful or irregular. It departs from the premise that the court is in charge of its own processes and is at large, where it is convinced that the course is appropriate, to grant a special dispensation for the proceedings to depart from ordinary the course pencilled in rule 76. I am of the considered view that the approach in the *IBB* case<sup>7</sup> is not inconsistent with the *SAPA* case in so far as the court was approached to allow a departure from the otherwise beaten track established in rule 76.

[55] In the premises, I am of the considered view that this point of law eagerly requests for a dismissal, which I duly oblige and grant forthwith. There is clearly no merit in the respondents' contention in this connection.

#### *Non-joinder of councillors*

[56] The government respondents have also raised an issue regarding the non-joinder of the traditional and senior councillors. They claim that on the above premise, the application must be dismissed. I will deal pointedly and swiftly with this point of law, which, in my considered opinion, is devoid of merit.

[57] In terms of s 2 of the Act, traditional councillors and senior traditional councillors, constitute some of the constituent elements of the traditional authority. In this regard, s 2 of the Act reads as follows:

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<sup>7</sup> *IBB Military Equipment and Accessory Supplies CC v Namibia Airports Company* (HC-MD-CIV-ACT-OTH-2017/01488) [2017] NAHCMD 318 (8 November 2017).

'(1) Subject to this Act, every traditional community may establish for such community a traditional community consisting of –

- (a) the chief or head of that traditional community, designated and recognized in accordance with this Act; and
- (b) senior traditional councillors and traditional councillors appointed or elected in accordance with this Act.

(2) A traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over the traditional community in respect of which it has been established.'

[58] It appears to me that when proper regard is had to the above provisions, they speak to the formation of a traditional community, which the sixth respondent claims, not without disputation, to be one. If, as s 2(1) above stipulates, traditional communities are composed of the chief or head of that community and traditional councillors and senior traditional councillors of that particular community. Where a party cites that traditional community, it becomes unnecessary to personally cite the councillors. This, in my view is so because they are part of the traditional community.

[59] If the government respondents' arguments were taken to their logical conclusions, it would require that the individual members of the traditional community be individually cited, which would cause chaos and impracticability of tragic proportions. The traditional community, in terms of the law, is juristic person and once cited as such, all the necessary components that make up the said community, need not be personally cited, in my considered view.

[60] Should I be incorrect in my finding above, I am of the considered view that in any event, failure to join a necessary party does not, without more, result in a dismissal of the claim of the applicant. Non-joinder is a dilatory plea and not a declinatory one. As such, if it is not complied with, it does not result in the applicant or other party, being non-suited.<sup>8</sup> All that would happen, is that the court stays the proceedings until the necessary party is joined to the

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<sup>8</sup> Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4<sup>th</sup> edition, Juta p. 187.

proceedings. This accordingly leads me, in any event, to the conclusion that a dismissal of the application on the grounds of non-joinder, as alleged, is not appropriate in the present circumstances. This point of law is accordingly dismissed.

[61] Having considered the various points of law *in limine*, and the return I made in relation thereto, namely, that they are all devoid of merit, I am now perfectly poised and placed, to make judgment regarding the description given to the points of law *in limine* by the applicant. The applicant took the view that they amounted to nit-picking and a spurious point-taking exercise, which is entirely devoid of merit. I am of the considered view, that the applicant's assessment of the points of law, is correct. These points of law are indeed spurious and serve no purpose than to unnecessarily burden the proceedings with needless chatter and adjudication.

[62] Counsel is expected, as an officer of the court, not to take the court on a wild goose chase, and a conducted tour of historical but irrelevant legal propositions that stand no chance of success. This is so, regardless of how animated and insistent the client might be, with the deposit of the entire sink and its contents, so to speak, in the face of the court. The need to preserve the court's time and judicial resources wisely and in a comely manner, need not be emphasised more.

### The merits

[63] Having disposed of the respondents' points of law *in limine*, I now proceed to deal with the application on the merits. In doing so, I find it necessary to point out that the parties appear to have divided their submissions in accordance with the relief sought. I accordingly find it convenient to follow the protocol, as it were, established by the parties in that regard. I proceed to do so below.

[64] I turn to the relief sought, prayer 1.1 and 1.2 of the amended notice of motion, which shall be treated *in pari passu* (at once) for the purpose of this

application. They concern two decisions essentially. The first, is the Minister's decision taken in October/November 2018, to approve the designation of Mr Hoveka as chief of the HTA. The second decision, dated 23 November 2018, is the designation Mr Hoveka as chief of the HTA.

[65] I am of the considered view that these decisions are inter-related and for that purpose, it would be convenient to deal with them as one. They in any event, constitute a chain, with the first decision being foundational and the subsequent one, being anchored on the first.

[66] The applicant sets out the history that occurred before the two impugned decisions were made. I will briefly narrate that history to the necessary extent. In this regard, there is reference to the record that bears testimony to the events that took place previously before the two impugned decisions were made. That history, which may be critical in the determination of this matter, is, for that reason, summarised below.

[67] It would appear that since 1999, the Hoveka clan had made attempts to be recognised as a separate traditional community. These attempts were unsuccessful. The first application was made under the repealed Act. It was in October 2005.<sup>9</sup> The applicant was coined as the Hoveka Royal House, with the traditional community identified as the Epukiro Traditional Community. The area occupied by this community, was identified as the eastern part of Namibia, in the Omaheke Region, with members scattered in Epukiro, Gobabis, Windhoek, Eiseb area and Rietfontein. The applicant was Mr Silvanus Kaveriva Hoveka.

[68] The Minister at the time, Mr John A. Pandeni, by letter dated 22 May 2006, declined the application. He reasoned that the area identified in the application i.e. Epukiro, falls under the jurisdiction of the applicant, which is recognised in terms of the Act.<sup>10</sup>

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<sup>9</sup> Record of proceedings, p 134.

<sup>10</sup> Record of proceedings, p 137.

[69] Not to be undone, another application was lodged on 29 April 2008. It was again in relation to the Hoveka Royal House. The applicant was the same as in the previous application. The name of the traditional community represented, was stated to be Herero/Mbanderu (Otjimana) Traditional Community. The communal area inhabited was stated to be Epukiro, Omaheke Region and that the population of the community was 3000 strong. Mr Hoveka, the applicant in that application, unfortunately predeceased the decision of the application on 16 November 2011.

[70] A third application was launched on 23 January 2012 for the approval of the intended designation of the current Mr Hoveka as chief. This was also in respect of the Hoveka Royal House. The traditional community was described once again as the Herero/Mbanderu (Otjimana) Traditional Community, occupying the Epukiro area, Omaheke Region.<sup>11</sup>

[71] The Minister, Maj. Gen (rtd) Charles Namoloh, by letter dated 15 April 2013, advised the third respondent's legal practitioners, then Hengari, Kanguuehi Kavendjii Inc, that an investigation committee had been constituted and would commence its duties that same year. He advised further that the applicant Mr Hoveka, would be advised on the date of the investigation.<sup>12</sup>

[72] On 10 October 2012, Mr Festus Sam Kamburona, writing a letter on behalf of the Hoveka Royal House, informed the Principal Secretary that section 3 of the application dated 12 October 2005, should be amended for the following reason:

'As can be seen from our application submitted on 12 October 2005 of which a copy is attached hereto: the name of the Traditional Community in Part A section 3 of that application was initially submitted as "Epukiro Traditional Community." However, on the advice of the then Minister of the Ministry of Regional and Local Government and Housing Hon: Kazenambo Kazenambo, we had to amend the name

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<sup>11</sup> Record of proceedings, p 145 – 146.

<sup>12</sup> Record of proceedings, p 148.



of the Traditional Community to “Epukiro/Manderu (*sic*) Traditional Community” so as to reflect the Traditional Communities represented by the Hoveka Royal House. Following our presentation to the Council of Traditional Leaders in November last year, we thought it appropriate to amend the name of the Traditional Community to “Epukiro Ovaherero Traditional Community” in order to avoid any confusion with the “**Ovambanderu Traditional Authority.**” Our action is further supported by our presentation to the Council of Traditional Leaders in which it is clearly demonstrated that we have been regarded as Herero’s since we settled in the Epukiro enclave in the 1920’s before the Mbanderu came on the scene in the 1960’s, and as such we have no objection to be recognized as “**Epukiro Ovaherero Traditional Community**”, and hence the reason for the amendment.’

[73] That letter ended by advising the Minister to inform the President and the Council of Traditional Leaders that the previous applicant, the late Chief Sylvanus K. Hoveka had been succeeded by his younger brother, Mr Hoveka, the third respondent in this matter.

[74] Another application was lodged on 23 July 2018. Mr Hoveka is the applicant. The traditional community is referred to as the Otjimana Traditional Community, consisting of plus/minus 3500 inhabitants of Eiseb Block Communal Area. The customary law practised was recorded as being ‘Otjimana Traditional Community’s customary law similar to the Ovaherero Traditional Community’s Customary law.’

[75] The applicant criticises the Minister in the first place for playing an unseemly role in offering advice to the third respondent in how the application should be approached in order to avoid raising queries and complications as recorded above. This was when he advised the HTA in April 2018 in a meeting that it should apply for recognition in respect of an area which no traditional authority has jurisdiction. This, the applicant contends, placed the Minister in a position where he was compromised in bringing an unbiased mind to bear on the application on its true and proper merits.

[76] In the instant case, the applicant accuses the Minister of not following the relevant provisions of the Act in designating Mr Hoveka, especially in view

of the previous applications that had been declined. It is the applicant's view that the Minister, in view of the previous failures, knew that the HTA was part of the applicant and as such, was not competent in terms of the law, to be recognised as a separate traditional community. His decision, it is contended, is thus *ultra vires* the Act and thus liable to be set aside on that basis.

[77] In his response, the Minister states that he took into account all the information that was placed at his disposal, including that placed before him by the Governor. It is that information, he argues, that placed him in a position where he could approve the designation of Mr Hoveka. He further contends that he was not bound by the decisions made by his predecessors in respect of previous applications for designation.

[78] When the applicant cries foul that it was not afforded a hearing before the Minister approved the recognition to Mr Hoveka, the Minister's response is terse. He states the following at paras 125 and 126 of his answering affidavit:

'125. In any event, I point out that the decisions that I took in so far as they relate to the designation of the 3<sup>rd</sup> respondent did not require me to grant an opportunity to the applicant to make representations.

126. In addition, I assert that, in the event that it is found that the applicant should have been consulted or should have been granted an opportunity to make representations, I assert that, the applicant was consulted by the Hoveka Royal House and it had no objection on the application and in those circumstances that consultation was sufficient and it did not in these circumstances require me to again consult it at the time I made my decision.'

[79] In my considered view, the whole application for review turns on the correctness of the Minister's assertions in the above quoted paragraphs to a large extent. If he is correct in his opinion that the applicant was not entitled to a hearing, the decision may survive scrutiny. If not, it will flounder in the muddy waters and will not see the light of day.

[80] That might not be the end of the enquiry though. This is because the Minister contends that if the court finds that the applicant was entitled to a hearing, which he submits it was not, then the applicant was afforded consultation by the HTA 'and it had no objection and in those circumstances that consultation was sufficient and it did not in these circumstances require me to again consult it at the time I made my decision.'<sup>13</sup>

[81] Are these contentions sustainable? I deal with them in turn, commencing with whether the Minister is correct that he was not required in terms of the law, to afford the applicant a hearing, as recorded above. One thing that cannot be denied, is that the HTA, or whichever name it had previously used to make applications for recognition, had not previously succeeded. The applicant, it is clear, played a part in some of the information placed before the relevant officials, which led to the refusal of the HTA's recognition previously.

[82] The Minister, it must be stated, is an official, who occupies an office for an appointed season. That, however, does not render him entitled to work in a silo and move forward only. There are matters, which might serve before him or her, which might have served before his or her predecessors. Where applications had been made previously and were similar to one placed before him or her, he is required to engage the institutional memory at his disposal and inform himself of the reasons of previous refusals and consider those in the light of the new information placed before him or her.

[83] In the instant case, it is clear that the HTA had filed previous applications for recognition, which had failed. It was incumbent upon the Minister, in that regard, to consider the reasons for the previous refusals and inform himself accordingly as to whether or not, those previous impediments still exist. He cannot adopt the position, which he appears to, that he is not required to consider previous relevant information and decisions which are, in any event, not binding on him. One of the reasons previously given for refusal, was that the OTA was part of the applicant.

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<sup>13</sup> Para 126 of the Minister's answering affidavit, p 358 of the record of proceedings.

[84] The Minister cannot, as he attempts to do, assert that what was before him was an application by the Otjimana Traditional Community. If he had considered the previous applications by the same party, he would have noticed how the names changed as time went on. In other cases, the area where it was alleged the members were resident changed. This should have placed the Minister on the *qui vive* or red alert so that he asks the necessary tough questions, if need be. More importantly, it was also clear that the applicant, from the application forms that the OTA was made up of the OvaMbanderu traditional community. This, it is clear on the record, was the reason why the previous applications had been refused.

[85] I have not found the reasons provided by the Minister as to why he found that the Otjimana traditional community existed as a separate community. This, in my view, appears to run counter to the provisions of s 5(3) of the Act, which reads as follows:

‘Notwithstanding subsection (2), if in respect of an application referred to in subsection (1) the Minister is of the opinion that –

(a)(i) the person sought to be designated as a chief or head of traditional community represents a group of persons who are members of a traditional community in respect of which a chief or head of a traditional community has been designated, and recognized under this Act; or

(ii) such group of persons do not constitute an independent traditional community inhabiting a common communal area detached from another traditional community; or

(iii) such group of persons do not comprise a sufficient number of members to warrant a traditional authority to be established in respect thereof, and

(b) that there are no reasonable grounds for recognizing such group of persons, as a separate traditional community, the Minister shall advise the President accordingly.’

[86] Information as to why it was contended previously that the OTA was part of the applicant was before him. Furthermore, had the Minister afforded the applicant a proper hearing, he may have been informed of the reasons

why the applicant would oppose the proposed designation and recognition of the HTA as a separate traditional community.

[87] There is no question that the approval of the designation of Mr Hoveka by the Minister as chief of the Hoveka Royal House in Eiseb, and the subsequent decisions that follow from the Minister's approval, had a deleterious effect on the applicant, which had previously opposed the OTA's attempts at designation and recognition of its intended chief.

[88] In *Matardor Enterprises (Pty) Ltd v Minister of Trade and Industry*<sup>14</sup>, it was stated as follows:

'The right to be heard after all contemplates that those affected by a decision should be in a position to address relevant material which is adverse to them. This did not occur by not disclosing the cabinet decision to them. This certainly lacked transparency and adversely impacted upon the right to be heard. The right to be heard and fairness demand that persons adversely affected by a decision be afforded the opportunity to be heard with a view to producing a favourable result and require that they are apprised of factors which they need to address. As was stressed by this court –

“art 18 of the Constitution of Namibia pertaining to a administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but inherent in that requirement, fair and transparent procedures which are transparent.’

[89] Although this might by now, to many, sound like a broken record, the remarks by Tebbutt JA in *Swaziland Federation of Trade Unions v President of the Industrial Court*,<sup>15</sup> ever ring true. They constitute one of the best formulations of the right to be heard, in my opinion. The learned Judge stated the following:

'The audi alteram partem principle i.e. the other party must be heard before an order may be granted against him, is one of the oldest and universally recognised

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<sup>14</sup> *Matardor Enterprises (Pty) Ltd v Minister of Trade and Industry* 2015 (2) NR 477 (HC) 477 para [105].

<sup>15</sup> *Swaziland Federation of Trade Unions v The President of the Industrial Court and Another* [1998] SZSC 8 (01 January 1998).

principles enshrined in our law. That no man is to be judged unheard was a precedent known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English judge to be a principle of divine justice and traced to the evens in the Garden of Eden, and has been applied from 1723 to the present time (see de Smith: *Judicial Review of Administrative Action* p. 156.)

[90] I endorse those remarks, together with those in *Metardor*, as accurately reflective of the proper approach to administrative justice in this country. Persons who are likely to be affected by a decision, are required by Art 18, to be afforded an opportunity by the decision-maker, before he or she makes that decision, to afford them a hearing. This is so that their representations and views, are taken into account in the process of making the decision. This must be so whether the decision-maker may form a *prima facie* view that their representations are not likely to stem the tide.

[91] The wisdom to be found in the oft-quoted excerpt in *Megarry v Rees*<sup>16</sup> must not be overlooked, even in what a decision-maker may unilaterally consider to be a case that is as clear as daylight. It was stated that 'The path of the law is strewn with examples of open and shut cases which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion suffered change.'

[92] In this matter, whatever else had previously happened, what was important, was that the Minister should, knowing the applicant's well-documented interest in the application for approval of the designation of Mr Hoveka, have afforded the applicant a hearing. If he was intent on departing from the decisions of his predecessors, which favoured the applicant, he should have advised the applicants accordingly and afforded them an opportunity to persuade him otherwise. His failure to do so, in my view attracts one ineluctable conclusion, namely that his decision must, for that reason alone, be reviewed and set aside.

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<sup>16</sup> *Megarry v Rees* [1970] Ch 345 at 402-3.

[93] It is further disturbing that the Minister could, as alleged, offer advice to the HTA in respect of an application pending before him. This is made abominable by the fact that the applicant was not present when this advice, which from any angle, appears iniquitous, was rendered. It is no answer for the Minister to say that he is required to meet all Namibians who wish to see him. Where matters are pending before him and he has to decide them, it is odious that he should see them and later sit in judgment over those very matters. A clear line must be drawn between advisors and decision-makers. Once these lines are blurred, the decision may have to be set aside. Decision-makers must always wear neutral and transparent adjudicatory apparel.

[94] Where an adjudicator, or decision-maker appears, even in private, to wear the colours of a certain team in a contest before him or her, and renders advice in relation to the decision that he or she is required to make, his or her inclination to that party, exemplified by the advice rendered, disqualifies him or her from taking a decision in respect of that party and that matter. Absolute neutrality and impartiality, are the hallmarks of decisions that may be found to stand up to judicial scrutiny.

[95] I now proceed to consider the alternative argument by the Minister, now that I have held that the applicant was entitled to a hearing, to consider, whether he is correct that the applicant had been afforded consultation by the HTA. In the Minister's view, having been afforded consultation by the HTA rendered it unnecessary for the Minister to consult the applicant. Is this position tenable?

[96] I think not. We should not, at this level, confuse the roles. The HTA was a party to the dispute, which served before the Minister, and so was the applicant. It is, in my considered view irresponsible and an abdication of duties for a Minister to not afford a party that will clearly be affected by a decision that is pending before him or her and say that the other party to the dispute consulted the affected party.

[97] Roles should not be reversed or confused. All interested parties are entitled to make representations to the decision-maker. The latter cannot, where he or she is required to make a decision involving two or more disputants, then expect the disputants to consult each other and thus alleviating his or her duty to give a hearing to all the parties. That is in fact a classic case of abdication. A party to a dispute cannot be allowed to usurp the powers and duties of the decision-maker and be expected to consult the other, unless the parties enter into a compromise of sorts that the decision-maker is later requested to endorse.

[98] In the premises, I am of the considered opinion that the Minister was on the wrong side of the law. Not only did he not afford the applicant a hearing, which is impermissible conduct from a decision-maker. He proceeded to improperly assign his duties, as it were, to one of the interested parties to give 'a hearing' to the applicant. This is anathema and should not be allowed. A clear distinction must be maintained between disputants and the decision-maker. A dual role of disputant and decision-maker, is not compatible when residing in one person. This is for obvious reasons that justice may not be done or undoubtedly be seen to have been done.

[99] In view of the foregoing reasons, I come to the inexorable conclusion that the applicant is in the circumstances, entitled to the relief sought in prayers 1.1 and 1.2 of its amended notice of motion. The Minister's actions in this regard, do not stand up to scrutiny in my considered view. He acted improperly and his decisions aforesaid, must be set aside therefor.

[100] Before closing the curtain on this aspect of the matter, there is one important observation that I am in duty, bound to make. The Constitution strikes a magnificent balance and tapestry between parties being able to access the courts and finality of disputes. In respect of the latter, it is clear that the Supreme Court is the final arbiter on legal disputes in this jurisdiction. What is disconcerting in this matter, is that it is clear that the OTA or HTA previously brought applications for recognition before previous Ministers, which failed. Some of them reached this court. In this regard, those



unsuccessful parties have remedies, either to appeal or review those decisions in terms of the law.

[101] It constitutes an ugly spectacle where a case like the present, seems to have nine lives like a cat. It is unseemly that a matter like this continues in perpetuity and appears to mutate either in terms of the name of the intended chief, the name of the traditional authority or the location where the community is alleged to be based. Where an application for designation and or recognition, as the case may be is refused, the applicant therefor has a right to challenge that decision up to the highest echelons and the matter must reach finality. It cannot be that once the application fails on one or other ground and without exhausting the available remedies, one goes back to the drawing board and panel-beats the application and brings it yet again in another form in order to avoid the previous fate. There must be finality in these matters so that people can get on with their lives and know that the final word on the issue has been spoken.

[102] In view of the decision to which I have arrived regarding the failure to afford the applicant a hearing, I am of the considered opinion that this should be the end of the matter. I say so for the reason that all the subsequent decisions sought to be impugned, including that of the President, has as its foundation and being, the approval of the recognition of the HTA as a separate traditional community and the approval of the designation and recognition of Mr Hoveka as chief thereof. To the extent necessary, I deal briefly with the President's decision below.

#### The President's decision

[103] It is common cause that the President, acting in terms of s 6(2) of the Act, recognised the designation of Mr Hoveka and in that connection, issued a proclamation in terms of the Act. I need not break more sweat on this matter except to state that I do not agree with Mr Khama's characterisation of the President's decision to proclaim the HTA and Mr Hoveka, together with the

other officials of the HTA as an executive decision. That is not out borne by the law or the facts.

[104] Section 6 is the one that deals with the powers of the President to proclaim a chief or head of a traditional community. In terms of the said provision, if the Minister is satisfied that a chief or head of a traditional community has been designated in accordance with provisions the Act, he or she shall notify the President of such designation and shall in writing, specify the name, office, traditional title (if any), the date of designation, and name of the traditional community concerned. On receipt of this notice, the President recognises the designation as such by proclamation in the *Gazette*.

[105] I am of the considered view that on a proper reading of the provisions referred to above, it is clear that the President, acting on the presumption that the Minister had acted properly and as dictated by the law in notifying the President, issued the proclamation. Now that the court has held that the Minister did not follow the prescripts of the law, the President's recognition of the designation, which I have no reason to doubt, was made in good faith, believing that the Minister had acted properly in line with the legislative prescripts, cannot survive on its own, *dehors*, the foundation, which is the decision of the Minister.

[106] It is my considered view that its efficacy depends entirely on the validity of the Minister's decision. The fact that the recognition of the designation by the President is issued as a proclamation does not of itself, place it beyond judicial and curial scrutiny. The fact that it is a proclamation does not serve to denude it of its true existential powers, namely, that it follows upon the making of a valid decision by the Minister, as required by law.

[107] It must necessarily be pointed out that when the President makes the proclamation, he does not do so in pursuance of the provisions of Art 32 of the Constitution, as the Minister claims and as argued by Mr Khama. In issuing the proclamation in this case, the President acted in terms of s 6 of the Act. The Constitution is, with respect, not implicated at all.

### The Governor's decision

[108] I heard Mr Khama, during his address, argue that the Minister's decision cannot be impugned without having first impugned the Governor's decision. I understand this to refer to the role played by the Governor in the eventual approval of the designation of a chief. The Regulations made under the Act, prescribe a form (Form A), that must be completed by an applicant for approval of his or her designation by the Minister.

[109] In terms of the said form, the Governor of the regional council of the region in which the traditional community is situated, must complete and sign Part C of the said form. The question is whether this signature by the Governor can be regarded, for purposes of this case, as an administrative action that needs to be set aside on review, in the absence of which the Minister's decision cannot stand?

[110] I am of the considered view that the role, the Governor plays in the eventual designation of a person as chief, is not a decision that is reviewable. It has been recognised in administrative law circles, that not every action, even if minute, taken in the course of making a final administrative decision, is susceptible to review. Professor Hoexter in her work entitled, *Administrative Law in South Africa*,<sup>17</sup> states that it is only decisions that have a 'direct and external legal effect' on the applicant, that qualify to be considered as administrative action.

[111] This view is consistent with an Australian decision in *Australia Broadcasting Tribunal Board v Bond and Others*<sup>18</sup> where the court expressed itself as follows:

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<sup>17</sup> Hoexter and Penfold, *Administrative Law in South Africa*, Juta & Co, 3<sup>rd</sup> ed, p 227-228.

<sup>18</sup> *Australia Broadcasting Tribunal Board v Bond and Others* Australian Law Reports, 11 (HCA) (1990) 170 CLR 321 at 32 and 43 (26 July 1990).

‘On a similar process of reasoning in the present case, the determination of maximum gas prices was made by way of a staged process which only became binding on its completion when NERSA gave its decision on Sasol’s application. The fact that there were various steps in the process does not render each of these steps individually, an administrative action which adversely affected the rights of any person. For as Nugent JA stressed, in *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*; 2005 (6) SA 313 para 24, administrative action in general terms involves the conduct of the bureaucracy having “direct and immediate consequences for individuals or groups of individuals.” NERSA’s determination of the methodology to be used did not have consequences of that nature. It could only have had such an impact once it determined what Sasol Gas’s maximum prices should be. Until then, it did not bind any party and, in my view, did not constitute administrative action.’

[112] It is accordingly clear in this case, that the role of the Governor, described above, was a first step in a series of momentous steps later taken towards the approval of the designation. It did not, standing alone, have a decisive and detrimental consequence on the designation issue, such as to constitute administrative action on its own. In other words, it did not have a direct and external legal effect on the applicant’s rights. I accordingly dismiss this argument for the above reasons.

### Conclusion

[113] In view of the foregoing conclusions, I am of the considered opinion that the applicant’s application for review is meritorious. I have found that the decisions by the Minister, are, for the reasons stated above, invalid as they violate the applicable law. Furthermore, they violate the provisions of Art 18 of the Constitution. They cannot be allowed to survive the court’s curial scrutiny. In the result, the applicant’s application must succeed.

### Costs

[114] The general rule applicable to costs is that costs should ordinarily follow the event. Although not a hard and fast rule, there must be concrete reasons that inform the court's decision to depart therefrom. In the instant case, there is nothing said by the respondents, or apparent from the papers suggesting why the ordinary rule should not apply. There is no reason for the court to exercise its discretion in the respondents' favour. The respondents must thus pay the applicant's costs in the manner to be stated in the order below.

### Order

[115] In view of the conclusions reached above, it is the court's considered view that the following order should resultantly ensue:

1. The decision by the Minister in October/November 2018 approving the designation of the third respondent as Chief of the Hoveka Royal House is hereby reviewed and set aside.
2. The designation of the third respondent as chief of the Hoveka Traditional Authority on 23 November 2018, pursuant to the Minister's aforesaid approval referred to in paragraph 1 above, is declared null and void as contemplated in section 3(4) of the Traditional Authorities Act 25 of 2000.
3. To the extent necessary, the decision of the second respondent, taken on or about 19 July 2019 and published in Government Gazette No. 6965 as Proclamation 29, recognising the third respondent as the Chief of the Hoveka Traditional Authority, residing in Eiseb Block, is hereby reviewed and set aside.
4. The respondents are ordered to pay the costs of the application jointly and severally, the one paying and the other being absolved with the said costs being consequent upon the employment of one instructing and one instructed legal practitioner.
5. The matter is removed from the roll and is regarded as finalised.

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T S MASUKU

Judge

## APPEARANCES

APPLICANT: N Bassingthwaighte  
Instructed by: Palyeenime Incorporated, Windhoek

1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> RESPONDENTS: D Khama  
Instructed by: Office of the Government Attorney

3<sup>rd</sup> & 6<sup>th</sup> RESPONDENTS K Kangueehi  
Of Kangueehi & Kavendjii  
Incorporated, Windhoek